Supreme Court, U. S.
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APPENDIX

In The

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-105

CURTISS-WRIGHT CORPORATION,

Petitioner,

vs.

GENERAL ELECTRIC COMPANY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED JULY 23, 1979
CERTIORARI GRANTED OCTOBER 1, 1979

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5-5-77	Notice of Motions of Plaintiff for Summary Judgment on the Amendment To And Supplemental Complaint and to strike Defendant's Seventeenth, Eighteenth, and Nineteenth Defenses to the Amendment To And Supplemental Complaint and to dismiss Defendant's Counterclaim, filed May 3, 1977.
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6-1-77	Notice of Motion of Defendant for Summary Judgment on the Amendment To And Supplemental Complaint, filed May 31, 1977.
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9-28-77 Hearing on parties' Motions for Summary Judgment on the Amendment To And Supplemental Complaint and on Plaintiff's Motions to strike Defendant's Seventeenth, Eighteenth, and Nineteenth Defenses to the Amendment To And Supplemental Complaint and to dismiss Defendant's Counterclaim (September 26, 1977).

12-6-77 Opinion on parties' Motions for Summary Judgment on the Amendment To And Supplemental Complaint, filed December 5, 1977.

1-16-78 Notice of Motion of Plaintiff to Settle the Judgment and Order on the parties' Motions for Summary Judgment on the Amendment To And Supplemental Complaint and Plaintiff's Motions to strike Defendant's Seventeenth, Eighteenth, and Nineteenth Defenses and to dismiss Defendant's Counterclaim, filed January 12, 1978.

2-28-78 Order denying Plaintiff's Motions to strike the Seventeenth Defense and to dismiss Defendant's Counterclaim, filed February 24, 1978.

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3-22-78 Notice of Motion of Plaintiff for an Award of Prejudgment Interest on the Amendment To And Supplemental Complaint, filed March 21, 1978.

6-1-78 Hearing on Plaintiff's Motion for an Award of Prejudgment Interest (May 30, 1978).

6-22-78 Opinion on Plaintiff's Motion for an Award of Prejudgment Interest, filed June 20, 1978.

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8-4-78	Notice of Appeal, filed August 3, 1978.
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4-17-79	Opinion and Judgment of the Third Circuit Court of Appeals filed.
4-30-79	Petition by Appellee, Curtiss-Wright Corporation, for rehearing en banc filed.

5-1-79	Appellant's Motion to Amend the Opinion of the Third Circuit Court of Appeals filed.
5-10-79	Response of Appellee, Curtiss-Wright Corporation, to Appellant's Motion to Amend the Opinion filed.
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5-21-79	Order of the Third Circuit Court of Appeals Amending Dissenting Opinion filed.
6-4-79	Order of the Third Circuit Court of Appeals Denying The Petition for Rehearing filed.
	Dissenting Opinion Sur Denial of Petition for Rehearing filed.
6-12-79	Judgment of the Third Circuit Court of Appeals Issued in Lieu of a Formal Mandate filed.

COMPLAINT AND DEMAND FOR JURY TRIAL, FILED APRIL 30, 1976

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 76-794

CURTISS-WRIGHT CORPORATION,

Plaintiff,

vs.

GENERAL ELECTRIC COMPANY,

Defendant.

AS TO ALL COUNTS

JURISDICTION AND VENUE

1. This action is within the jurisdiction of this Court by virtue of Title 28, United States Code, Sections 1332 and 1391.

2. Plaintiff is a corporation incorporated under the laws of the State of Delaware, and has its principal place of business in the Borough of Wood-Ridge, County of Bergen and State of New Jersey, where it is engaged in the business, among others, of manufacturing and selling large metal components for use in the construction of nuclear propulsion plants for U.S. Navy submarines and surface ships.

3. Defendant is a corporation incorporated in the State of New York, and has its principal places of business in states other than Delaware and New Jersey.

Complaint and Demand for Jury Trial

4. Defendant is engaged in the business, among others, of purchasing nuclear propulsion plant components on behalf of or for resale to the United States Navy.

5. Defendant maintains one or more offices in New Jersey.

6. Defendant is subject to the jurisdiction of this Court.

7. The subject matter of this action exceeds Ten Thousand ($10,000.00) Dollars, exclusive of interest and costs, and is between citizens of different states.

FIRST COUNT

8. In or about late 1967 and early 1968, preliminary discussions and negotiations were held between plaintiff, defendant (acting through its Machinery Apparatus Operation, Schenectady, New York), and the U.S. Navy Department to explore the possibility of plaintiff's becoming a supplier of large components used in the construction of nuclear propulsion plants for submarines and surface ships of the United States Navy.

9. Defendant then occupied and continues to occupy to the present time a program and/or contract management role with respect to the award of contracts to private industry for the ultimate procurement by the Navy of these components.

10. During the course of the discussions and negotiations aforesaid, and thereafter, defendant represented to plaintiff that it urgently needed to develop a new source of supply for the components aforesaid by reason of the fact that the existing sources, which possessed the capability and experience for the work, were either abandoning the business or were many months and even years delinquent in performance.

11. Although plaintiff had engaged in the business of manufacturing aircraft engines and missile cases, and possessed manufacturing experience of the kind derived from those businesses, plaintiff had no experience in the manufacture of the said nuclear components.

12. Defendant knew the extent of plaintiff's previous manufacturing experience and capabilities and further knew that plaintiff had no prior experience in the manufacture of said nuclear components.

13. With the knowledge aforesaid, defendant proceeded to induce plaintiff to enter into the business of becoming a supplier of the said components and in furtherance of said inducement, defendant stated to plaintiff that it had searched the length and breadth of the United States and had screened and studied the capabilities of many companies in an effort to find a supplier that was capable of manufacturing the components. Defendant assured plaintiff that defendant knew exactly the kind of capability it was looking for and that plaintiff could do the job with the help of defendant's knowledge, expertise and management competence, inviting and receiving plaintiff's trust and confidence to that effect.

14. On various occasions beginning early in 1968 and continuing thereafter from time to time through 1972, in meetings and conversations held at Wood-Ridge, New Jersey, and elsewhere, defendant, acting through its duly authorized agents, including the General Manager of its Machinery Apparatus Operation, induced plaintiff to enter into the business of manufacturing nuclear components and into a series of twenty-one contracts relating to same.

15. Said contracts were designated as Purchase Order Nos. A-550, A-595, A-641, A-642, A-656, A-661, B-382, B-423, B-428,

B-412, B-433, B-442, B-384, B-425, B-429, B-410, A-675, A-113, B-451, B-452 and B-478, and pursuant to same plaintiff agreed to manufacture, assemble, inspect, test, sell and deliver to defendant a total of 167 units in the aggregate of ten (10) different types of nuclear components for the aggregate sum of Two Hundred Fourteen Million Six Hundred Thousand ($214,600,000.00) Dollars, which defendant agreed to pay to plaintiff.

16. Defendant induced plaintiff to enter into said business and said contracts by making the following representations of fact to plaintiff:

(a) Defendant represented to plaintiff that plaintiff's entry into the business of manufacturing nuclear components was necessary in the interests of the national defense; that defendant intended to divide the orders for the bulk of the annual requirements for said components between plaintiff and the only then-remaining major source of supply; and that plaintiff would receive repetitive orders building up by 1974 to 8 reactor vessels, 8 reactor vessel closure heads, 8 pressurizers, and 22 steam generators per year.

(b) Defendant represented to plaintiff that, relative to any company then or formerly in the business, defendant and the Navy possessed superior knowledge, expertise, and management competence, in the manner, methods, processes and procedures of manufacturing the said nuclear components, which knowledge, expertise, and management competence equipped defendant to show plaintiff how to manufacture the components in accordance with the requirements of the contracts. Defendant further represented that it would make such knowledge, expertise, and competence available to plaintiff.

(c) Defendant represented to plaintiff that by virtue of defendant's superior knowledge, expertise and competence (1) defendant knew that the delivery schedules defendant was providing in the aforementioned contracts were adequate to cover the time that would reasonably be required by an inexperienced company such as plaintiff to produce the components; (2) defendant knew that the contract prices were more than adequate to cover plaintiff's costs of performance plus a reasonable profit, and; (3) consequently, defendant knew that plaintiff would be in a position of returning excessive profits to defendant under the incentive price revision formula in the contracts.

17. Each and every one of the foregoing representations so made by the defendant was false and fraudulent and/or was made by defendant as part of a scheme or artifice to defraud.

18. The said representations were known by the defendant to be false when made and were made with intent to deceive plaintiff and with the intent that plaintiff rely upon them and to induce plaintiff to become a supplier of said nuclear components, to enter into the aforesaid 21 contracts at the prices and with the delivery schedules therein established, to make large capital expenditures for the construction of a separate factory and special purpose facilities, to divert to the business of manufacturing said nuclear components its most skilled technical and management personnel from other segments of its business and agree not to make changes in such personnel assignments without defendant's approval and to devote extraordinary amounts of management and technical time and attention to the business of producing said nuclear components.

19. The aforesaid representations were material and at the time they were made, plaintiff believed them and did not know the truth and in reliance thereon plaintiff was induced to become a supplier of said nuclear components, to enter into the aforesaid 21 contracts at the prices and with the delivery schedules therein established and thereby to incur huge losses in the performance thereof, to make large capital expenditures for the construction of a separate factory and special purpose facilities and to incur losses on account of the lack of use thereof, and to injure other segments of its business by diverting its most skilled technical and management personnel from such other segments and devoting extraordinary amounts of management and technical time and attention to the business of producing said nuclear components, which losses, expenses and injuries were the proximate result of the aforesaid representations.

20. In reliance upon the aforesaid representations, plaintiff did take the aforementioned actions to its detriment.

21. By reason of the foregoing, defendant is liable to plaintiff for damages, both compensatory and punitive.

WHEREFORE, plaintiff demands judgment on this Count against the defendant as follows:

A. For compensatory damages, general and special;

B. For punitive damages;

C. For interest;

D. For costs of suit;

E. For attorneys fees.

SECOND COUNT

22. Plaintiff repeats and realleges all of the allegations contained in Paragraphs 1 through 21, inclusive, as if set forth at length herein.

23. Defendant, through its agents and employees, conspired with Vice Admiral Hyman G. Rickover of the U. S. Navy in a malicious and willful scheme to create a relationship of trust and confidence between defendant and plaintiff and to deceive plaintiff and deprive plaintiff of its proper costs and profits on the said 21 contracts.

24. The acts and omissions alleged in the First Count were in pursuit of the said conspiracy and scheme.

25. As a result of the foregoing, plaintiff has suffered damages for which defendant is liable to plaintiff.

WHEREFORE, plaintiff demands judgment against defendant as follows:

A. For compensatory damages, general and special;

B. For punitive damages;

C. For interest;

D. For costs of suit;

E. For attorneys fees.

THIRD COUNT

26. Plaintiff repeats and realleges all of the allegations contained in Paragraphs 1 through 16, inclusive, as if set forth at length herein.

27. The foregoing representations so made by defendant were false or erroneous.

28. The said representations were made by the defendant with intent that plaintiff rely upon them, and to induce plaintiff to become a supplier of said nuclear components, to enter into the aforesaid 21 contracts at the prices and with the delivery schedules therein established, to make large capital expenditures for the construction of a separate factory and special purpose facilities, to divert to the business of manufacturing said nuclear components its most skilled technical and management personnel from other segments of its business and agree not to make changes in such personnel assignments without defendant's approval, and to devote extraordinary amounts of management and technical time and attention to the business of producing said nuclear components.

29. Plaintiff repeats and realleges all of the allegations contained in Paragraphs 19 and 20, as if set forth at length herein.

30. As a result of the foregoing, plaintiff has suffered great losses, defendant has been and will be unjustly enriched, and plaintiff has no adequate remedy at law.

WHEREFORE, plaintiff demands judgment against defendant as follows:

A. That the contracts be reformed;

(1) To cover the training, learning, development, practice, quality assurance, rework and other costs of performance incurred or to be incurred by the plaintiff in the first-time manufacture of these nuclear components;

(2) To provide delivery schedules adequate to cover such first-time manufacture of the components by plaintiff;

(3) To provide that plaintiff will earn reasonable profit from such manufacture of the components;

B. That upon the contracts being so reformed, for an accounting, and for the payments due under the contracts as reformed;

C. For such other sums as defendant may be found, on accounting, to be liable to plaintiff as compensation for plaintiff's diversion from its established lines of business of the capital and other resources necessary to enter the business of manufacturing the components;

D. For such damages as plaintiff has sustained or may sustain as a result of any refusal or failure of defendant to recognize and assume obligations coincident with its obligations as reformed;

E. For the specific performance by the defendant of its obligations under said reformed contracts in the future;

F. Or, in the alternative, for compensation in the amount of the reasonable and just value of plaintiff's performance and investment in the business of manufacturing nuclear components;

G. For such further and other relief as plaintiff may be entitled to.

FOURTH COUNT

31. Plaintiff repeats and realleges all of the allegations contained in Paragraphs 1 through 16, inclusive, as if set forth at length herein.

32. Under the aforementioned circumstances and relationship existing between the plaintiff and defendant, plaintiff had a right to rely upon the representations and information given to it by defendant.

33. Defendant owed a duty to plaintiff, if it gave representations or information at all, to do so with due care.

34. Defendant knew said representations and information were desired by plaintiff for the purpose of deciding whether to enter the nuclear components business, that plaintiff intended to rely thereon, and that if said representations and information were false or erroneous, plaintiff would suffer great losses, expenses and injuries.

35. Said representations and information were false or erroneous and negligently made by defendant.

36. The aforesaid representations and information were material and at the time they were made plaintiff believed them

and in reliance thereon entered into the business of becoming a supplier of said nuclear components, entered into the aforesaid 21 contracts at the prices and with the delivery schedules therein established and incurred huge losses in the performance thereof, made large capital expenditures for the construction of a separate factory and special purpose facilities and incurred losses on account of the lack of use thereof, and injured other segments of its business by diverting its most skilled technical and management personnel from such other segments and expending extraordinary amounts of management and technical time and attention to the business of producing said nuclear components, which losses, expenses and injuries were the proximate result of defendant making and providing the aforesaid representations and information.

37. As a result of the foregoing, plaintiff has suffered damages for which defendant is liable to plaintiff.

WHEREFORE, plaintiff demands judgment against defendant as follows:

A. For compensatory damages, general and special;

B. For interest and costs of suit;

C. For attorneys fees.

FIFTH COUNT

38. Plaintiff repeats and realleges all of the allegations contained in Paragraphs 1 through 16, inclusive, as if set forth at length herein.

39. Under all of the circumstances aforesaid, a special relationship of trust and confidence was established between plaintiff and defendant.

40. The foregoing representations made by defendant were false or erroneous.

41. The said misrepresentations made by defendant within the context of the special relationship of trust and confidence developed between plaintiff and defendant, whether purposeful, negligent, or the result of a disregard for the truth of the representations by defendant, induced plaintiff to enter into the said business of becoming a supplier of nuclear components and the said 21 contracts to plaintiff's great damage.

42. In light of all of the foregoing, entry into the business and the said 21 contracts were the result of overreaching by defendants.

43. Defendant's actions in causing plaintiff to enter into said business and the said 21 contracts and the results therein obtaining as to plaintiff are unconscionable.

44. As a result of the foregoing, plaintiff has suffered damages but has no adequate remedy at law.

WHEREFORE, plaintiff demands judgment against defendant as follows:

A. That the contracts be reformed;

(1) To cover the training, learning, development, practice, quality assurance, rework and other costs of performance incurred or to be incurred by the plaintiff in the first-time manufacture of these nuclear components;

(2) To provide delivery schedules adequate to cover such first-time manufacture of the components by plaintiff;

(3) To provide that plaintiff will earn reasonable profit from such manufacture of the components;

B. That upon the contracts being so reformed, for an accounting, and for the payments due under the contracts as reformed;

C. For such other sums as defendant may be found, on accounting, to be liable to plaintiff as compensation for plaintiff's diversion from its established lines of business of the capital and other resources necessary to enter the business of manufacturing the components;

D. For such damages as plaintiff has sustained or may sustain as a result of any refusal or failure of defendant to recognize and assume obligations coincident with its obligations as reformed;

E. For the specific performance by the defendant of its obligations under said reformed contracts in the future;

F. Or, in the alternative, for compensation in the amount of the reasonable and just value of plaintiff's performance and investment in the business of manufacturing nuclear components;

G. For such further and other relief as plaintiff may be entitled to.

SIXTH COUNT

45. Plaintiff repeats and realleges all of the allegations contained in Paragraphs 1 through 15, inclusive, as if set forth at length herein.

46. In the early part of 1968 defendant represented to plaintiff that defendant and the Navy possessed superior knowledge, expertise and management competence in the manner, methods, processes and procedures of manufacturing said nuclear components relative to any company then or formerly in the business.

47. Defendant agreed to provide this knowledge, expertise and competence to plaintiff and show it how to become engaged in the business of manufacture and sale of said components in accordance with the price and delivery schedule terms under which defendant was willing to contract to buy said components; defendant also agreed to divide the orders for the bulk of the annual requirements for said components between plaintiff and the only then-remaining major source of supply; defendant further agreed to place repetitive orders with plaintiff for said components, building up by 1974 to 8 reactor vessels, 8 reactor vessel closure heads, 8 pressurizers and 22 steam generators per year, if plaintiff would become engaged in said business.

48. Defendant knew or should have known that plaintiff entered into the business of manufacturing said components for sale to defendant in reliance on defendant's agreement aforesaid.

49. In reliance on said agreement, plaintiff entered into a series of twenty-one contracts in writing with defendant, designates as Purchase Order Nos. A-550, A-595, A-641, A-661, A-642, A-656, B-382, B-423, B-428, B-412, B-433, B-442, B-384, B-425, B-429, B-410, A-675, A-113, B-451, B-452, and B-478, as aforesaid.

50. In further reliance on said agreement, plaintiff made large capital expenditures for the construction of a separate factory building and for special purpose facilities with which to carry on said business, diverted to said business its most skilled technical and management personnel from other segments of its business and agreed not to make changes in such personnel assignments without defendant's approval, and devoted extraordinary amounts of management and technical time and attention to the business of producing said nuclear components.

51. Before commencing the manufacture of said components plaintiff disclosed to defendant the manner, methods, processes and procedures which plaintiff considered appropriate for their manufacture and sought the knowledge, expertise and competence of defendant in the necessary and proper manner, methods, processes and procedures for said manufacture in accordance with the requirements of the aforementioned contracts.

52. Defendant failed to provide plaintiff with the necessary and proper knowledge, expertise and competence to show it how to manufacture said components as required by the contracts aforesaid.

53. As a proximate result of the foregoing, plaintiff encountered extreme and unusual difficulty and expense and incurred huge losses in the performance of said contracts, made large capital expenditures for the construction of a separate factory and special purpose facilities and incurred losses on account of the lack of use thereof, injured other segments of its business by diverting its most skilled technical and management personnel from such segments and devoting extraordinary amounts of management and technical time and attention to the business of producing said nuclear components, and was otherwise damaged.

WHEREFORE, plaintiff demands judgment against defendant as follows:

A. For compensatory damages, general and special;

B. For interest and costs of suit;

C. For attorneys fees.

SEVENTH COUNT

54. Plaintiff repeats and realleges the allegations contained in paragraphs 45 through 47 as if set forth at length herein.

55. Defendant also represented and agreed that the prices of said contracts were adequate to cover plaintiff's costs of performance, with the knowledge, expertise and competence to be provided by defendant, and to provide a reasonable profit to plaintiff, and that the incentive pricing formula was incorporated into said contracts merely to permit recovery by the defendant for the benefit of the Navy of any underruns in plaintiff's costs of performance of said contracts.

56. Defendant further represented and agreed that defendant's and hence the Navy's need for plaintiff as a new supplier of said nuclear components was not a temporary need arising from the buildup at that time of requirements for said nuclear components but was then foreseeably a need for a new supplier on a continuing basis.

57. Said representations and agreements, in light of all of the circumstances, incorporated and gave rise to an implied covenant of good faith and fair dealing to the effect that plaintiff would recover its costs of performance and realize a reasonable profit while it was learning the business of manufacturing said

nuclear components, and that plaintiff would continue to receive contracts for said nuclear components once it learned the business, provided defendant continued to have requirements for said nuclear components.

58. Plaintiff relied on said covenants and agreements and in consideration thereof agreed to become a supplier of said nuclear components, to enter into the aforesaid 21 contracts at the prices and with the delivery schedules therein established, to make large capital expenditures for the construction of a separate factory and special purpose facilities therefor and to divert skilled technical and management personnel from other segments of its business to the business of producing said nuclear components.

59. In learning how to produce said nuclear components with the benefit of such knowledge, expertise and competence as was supplied by defendant to plaintiff in performing said 21 contracts, plaintiff incurred costs of performance far in excess of the contract prices and was deprived of the reasonable profits expected to be realized from performance of said contracts.

60. Plaintiff has requested defendant to reimburse it for said excess costs of performance and to pay it the reasonable profits expected to be realized through performance, and defendant has breached said covenants and agreements by refusing said request.

61. Since plaintiff has learned how to produce said nuclear components, defendant and said Admiral Rickover have conspired to deprive plaintiff of any additional contracts for the production of said nuclear components, despite the existence of requirements therefor, in order to coerce plaintiff into not enforcing the aforesaid covenant of reimbursement of the costs of performance of said 21 contracts and payment of the

reasonable expected profit to be realized by plaintiff through performance of said contracts. Said conspiracy and defendant's refusal to continue to award contracts to plaintiff for the production of said nuclear components constitutes a breach of the aforesaid covenants and agreements.

WHEREFORE, plaintiff demands judgment against defendant as follows:

A. For compensatory damages, general and special;

B. For interest and costs of suit;

C. For attorneys fees.

EIGHTH COUNT

62. Plaintiff repeats and realleges all of the allegations contained in Paragraphs 1 through 16, inclusive, as if set forth at length herein.

63. During the period 1968 through 1972, defendant awarded plaintiff a series of twenty-one contracts in writing designated as Purchase Order Nos. A-550, A-595, A-641, A-661, A-642, A-656, B-382, B-423, B-428, B-412, B-433, B-442, B-384, B-425, B-429, B-410, A-675, A-113, B-451, B-452, and B-478, as aforesaid.

63. Said contracts specified not only the physical characteristics of the components to be manufactured by plaintiff, but also the qualifications of the welders, weld operators, welding procedures, welding equipment, nondestructive test and inspection personnel, nondestructive test procedures and nondestructive test equipment used to produce them.

64. Defendant warranted that plaintiff, despite plaintiff's lack of prior experience in their manufacture, could produce components of specified physical characteristics by employing personnel, procedures and equipment so qualified.

65. Plaintiff believed the warranty to be true and in reliance thereon proceeded to perform said contracts with personnel, procedures and equipment so qualified.

66. Defendant breached said warranty in that plaintiff's personnel, procedures and equipment, qualified to the specifications aforesaid, were not able to produce components meeting the specified physical characteristics, but produced components which failed to meet the specified physical characteristics and required vast amounts of rework to salvage.

67. Plaintiff's personnel, qualified as aforesaid, had to undergo extensive additional training and learning before they were able to produce components meeting the specified physical characteristics.

68. Plaintiff gave defendant notice of its inability to produce components meeting the specified physical characteristics with personnel, procedures and equipment qualified to said specifications.

69. Defendant failed and refused to make good on its warranty aforesaid.

70. By reason of said breach of warranty, plaintiff had been damaged.

WHEREFORE, plaintiff demands judgment against defendant as follows:

A. For compensatory damages, general and special;

B. For interest and costs of suit,

C. For attorneys fees.

NINTH COUNT

71. Plaintiff repeats and realleges all of the allegations contained in paragraphs 1 through 16, inclusive, as if set forth at length herein.

72. Through mutual mistake of the parties, said contracts did not make adequate provision either in the price or the delivery schedule for the training, learning and practice, the stringency of the quality requirements as interpreted by defendant, the consequent high incidence of rework, or the other extreme difficulty and unusual expense, as well as the normal costs of performance, required on the part of a company such as plaintiff having no prior experience in the business to perform the inherently complex welding and other fabricating and testing operations in order to produce the ten (10) types of components in accordance with the requirements of the contracts.

73. Without prior experience in the unique complexities of nuclear component manufacture, and, at defendant's urging, relying on defendant for guidance, plaintiff did not know of the inherent difficulty of the work and that literally years of first-hand experience and practice are required to perform it successfully.

74. Plaintiff's mistake consisted in the belief that its aerospace manufacturing capability equipped it to perform the contracts and earn a reasonable profit at the prices and delivery schedules fixed therein by defendant, with little or no change in

or addition to that capability, and without having to carry on extensive amounts of training, learning and practice, or encountering the stringent interpretations by defendant of the quality requirements, the consequent high incidence of rework or the other extreme difficulty and unusual expense that it experienced in performing the contracts.

75. Defendant likewise mistakenly believed that plaintiff possessed the kind of capability required to produce the nuclear components in accordance with the terms of the aforesaid contracts without having to carry on extensive amounts of training learning, practice, rework and encountering the other extreme difficulty and unusual expense experienced by the plaintiff as well as the previous companies engaged in their production.

76. It was the intent of the plaintiff and the defendant that plaintiff should be able to perform the aforesaid contracts and, as a result thereof, earn a reasonable profit.

77. In fact, plaintiff has suffered great losses and damages as a result of its performance of the contracts, as aforesaid, and, in light of the price and delivery schedule set by defendant, plaintiff has been frustrated with respect to the mutual intent of both parties that it earn a reasonable profit from the performance of said contracts.

78. Plaintiff requested defendant to increase the price of said contracts to cover the cost of the extensive amounts of training, learning, practice, rework and other extreme difficulty and unusual expense incurred by plaintiff to perform the inherently complex welding and other fabrication and testing operations to produce the components to the exacting, fail-safe quality requirements imposed by defendant, and defendant has refused to do so.

79. Plaintiff has no adequate remedy at law.

WHEREFORE, plaintiff demands judgment against defendant as follows:

A. That the contracts be reformed;

(1) To cover the training, learning, development, practice, quality assurance, rework and other costs of performance incurred or to be incurred by the plaintiff in the first-time manufacture of these nuclear components;

(2) To provide delivery schedules adequate to cover such first-time manufacture of the components by plaintiff;

(3) To provide that plaintiff will earn reasonable profit from such manufacture of the components;

B. That upon the contracts being so reformed, for an accounting, and for the payments due under the contracts as reformed;

C. For such other sums as defendant may be found, on accounting, to be liable to plaintiff as compensation for plaintiff's diversion from its established lines of business of the capital and other resources necessary to enter the business of manufacturing the components;

D. For such damages as plaintiff has sustained or may sustain as a result of any refusal or failure of defendant to recognize and assume obligations coincident with its obligations as reformed;

E. For the specific performance by the defendant of its obligations under said reformed contracts in the future;

F. Or, in the alternative, for compensation in the amount of the reasonable and just value of plaintiff's performance and investment in the business of manufacturing nuclear components;

G. For such further and other relief as plaintiff may be entitled to.

TENTH COUNT

80. Plaintiff repeats and realleges the allegations contained in Paragraphs 1 through 16, inclusive, as if set forth at length herein.

81. Through mistake on the part of plaintiff and misrepresentations or other inequitable conduct on the part of the defendant, said contracts did not make adequate provision either in the price or the delivery schedule for the training, learning and practice, the stringency of the quality requirements as interpreted by defendant, the consequent high incidence of rework, or the other extreme difficulty and unusual expense, as well as the normal costs of performance, required on the part of a company such as plaintiff having no prior experience in the business to perform the inherently complex welding and other fabricating and testing operations in order to produce the ten (10) types of components in accordance with the requirements of the contracts.

82. Without prior experience in the unique complexities of nuclear component manufacture, and, at defendant's urging, relying on defendant for guidance, plaintiff did not know of the

inherent difficulty of the work and that literally years of firsthand experience and practice are required to perform it successfully.

83. Plaintiff's mistake consisted in the belief that its aerospace manufacturing capability equipped it to perform the contracts and earn a resonable profit at the prices and delivery schedules fixed therein by defendant, with little or no change in or addition to that capability, and without having to carry on extensive amounts of training, learning and practice, or encountering the stringent interpretations by defendant of the quality requirements, and consequent high incidence of rework, or the other extreme difficulty and unusual expense that it experienced in performing the contracts.

84. Defendant's misrepresentation or other inequitable conduct consisted in its failure, despite its possession of superior knowledge of the extreme difficulty and unusual expense of producing the components, and of the stringency of the quality requirements as interpreted by defendant, to warn plaintiff thereof.

85. Plaintiff requested defendant to increase the prices of said contracts to cover the cost of the extensive amounts of training, learning, practice, rework and other extreme difficulty and unusual expense incurred by plaintiff to perform the inherently complex welding and other fabrication and testing operations to produce the components to the exacting, fail-safe quality requirements imposed by defendant, and defendant has refused to do so.

86. Plaintiff, as a result of the foregoing, has suffered great losses, but has no adequate remedy at law.

WHEREFORE, plaintiff demands judgment against defendant as follows:

A. That the contracts be reformed;

(1) To cover the training, learning, development, practice, quality assurance, rework and other costs of performance incurred or to be incurred by the plaintiff in the first-time manufacture of these nuclear components;

(2) To provide delivery schedules adequate to cover such first-time manufacture of the components by plaintiff;

(3) To provide that plaintiff will earn reasonable profit from such manufacture of the components;

B. That upon the contracts being so reformed, for an accounting, and for the payments due under the contracts as reformed;

C. For such other sums as defendant may be found, on accounting, to be liable to plaintiff as compensation for plaintiff's diversion from its established lines of business of the capital and other resources necessary to enter the business of manufacturing the components;

D. For such damages as plaintiff has sustained or may sustain as a result of any refusal or failure of defendant to recognize and assume obligations coincident with its obligations as reformed;

E. For the specific performance by the defendant of its obligations under said reformed contracts in the future;

F. Or, in the alternative, for compensation in the amount of the reasonable and just value of plaintiff's performance and investment in the business of manufacturing nuclear components;

G. For such further and other relief as plaintiff may be entitled to.

ELEVENTH COUNT

87. Plaintiff repeats and realleges all of the allegations contained in Paragraphs 1 through 16, inclusive, and Paragraphs 81, 82, 83, and 84, as if set forth at length herein.

88. Defendant further, and with the knowledge that plaintiff was laboring under the said mistaken belief concerning the effect and result of the contracts containing the price and delivery schedules set by defendant, permitted plaintiff to enter into the said contracts, to plaintiff's detriment.

89. Plaintiff repeats and realleges the allegations contained in Paragraphs 85 and 86 as if set forth at length herein.

WHEREFORE, plaintiff demands judgment against defendant as follows:

A. That the contracts be reformed;

(1) To cover the training, learning, development, practice, quality assurance, rework and other costs of performance incurred or to be incurred by the plaintiff in the first-time manufacture of these nuclear components;

(2) To provide delivery schedules adequate to cover such first-time manufacture of the components by plaintiff;

(3) To provide that plaintiff will earn reasonable profit from such manufacture of the components;

B. That upon the contracts being so reformed, for an accounting, and for the payments due under the contracts as reformed;

C. For such other sums as defendant may be found, on accounting, to be liable to plaintiff as compensation for plaintiff's diversion from its established lines of business of the capital and other resources necessary to enter the business of manufacturing the components;

D. For such damages as plaintiff has sustained or may sustain as a result of any refusal or failure of defendant to recognize and assume obligations coincident with its obligations as reformed;

E. For the specific performance by the defendant of its obligations under said reformed contracts in the future;

F. Or, in the alternative, for compensation in the amount of the reasonable and just value of plaintiff's performance and investment in the business of manufacturing nuclear components;

G. For such further and other relief as plaintiff may be entitled to.

TWELFTH COUNT

90. Plaintiff repeats and realleges all of the allegations contained in Paragraphs 1 through 16, inclusive, as if set forth at length herein.

91. In or about May 1971 while plaintiff was performing said contracts, defendant ordered and directed plaintiff to repeat the x-ray testing of the welds by plaintiff on a certain number of components, the welds on which plaintiff had already x-ray tested and found to meet the specification requirements.

92. Defendant's order and direction to plaintiff to re-x-ray the welds was prompted by a complaint made to defendant by a disgruntled employee of plaintiff that x-ray of the welds was not being done in accordance with the specification requirements.

93. Defendant's order and direction was made notwithstanding the fact that defendant participated in the x-ray testing of the welds and knew how it had been performed.

94. Plaintiff performed said work and defendant has accepted the results thereof.

95. The welds re-x-rayed were found to meet specification requirements.

96. Under the circumstances, said re-x-ray of the welds was not reasonably required to substantiate that fact and accordingly constituted changed, extra or substituted work over and above the base work included in the prices of the respective contracts.

97. As a result of the performance of said changed, extra or substituted work, plaintiff's on-going production operations experienced disruption and inefficiency through preoccupation

of plaintiff's quality control personnel and nondestructive test equipment and their resulting inability to timely detect and correct defective and inadequate welds and weld practices as they occurred.

98. As a proximate result of the foregoing facts, defendant is liable to plaintiff for additional compensation by way of a price increase or damages including not only the cost of the re-x-raying, but also the expense of the disruption and inefficiency caused the production operations as aforesaid.

WHEREFORE, plaintiff demands judgment against defendant as follows:

A. For compensatory damages, general and special;

B. For interest and costs of suit;

C. For attorneys fees.

THIRTEENTH COUNT

99. Plaintiff repeats and realleges all of the allegations contained in Paragraphs 1 through 16, inclusive, as if set forth at length herein.

100. In or about October 1973 while plaintiff was performing said contracts, defendant disapproved the procedures used by plaintiff to perform magnetic particle testing.

101. Said disapproval action was taken by defendant notwithstanding the fact that the Government's and defendant's quality control and inspection personnel had theretofore approved plaintiff's training and testing program for its magnetic particle testing personnel and had conducted periodic surveillance audits of their testing.

102. At defendant's order and direction the magnetic particle testing of all affected production hardware in process was done over and defendant has accepted the results thereof.

103. The retested production hardware was found to meet specification requirements.

104. The repeat of the magnetic particle testing was not reasonably required by the terms of plaintiff's contracts to substantiate the fact that said production hardware met specification requirements and accordingly constituted changed, extra or substituted work over and above the base work included in the prices of the respective contracts.

105. As a result of the repeat of the magnetic particle testing, plaintiff's on-going production operations experienced delay, disruption and inefficiency.

106. As a proximate result of the foregoing facts, defendant is liable to plaintiff for additional compensation by way of a price increase or damages including not only the cost of repeating the magnetic particle testing, but also the expense of the aforesaid delay, disruption and inefficiency of its production operations.

WHEREFORE, plaintiff demands judgment against defendant as follows:

A. For compensatory damages, general and special;

B. For interest and costs of suit;

C. For attorneys fees.

FOURTEENTH COUNT

107. Plaintiff repeats and realleges all of the allegations contained in Paragraphs 1 through 13, inclusive, as if set forth at length herein.

108. At the times and places abovementioned, defendant awarded contracts to plaintiff designated as Purchase Order Nos. A-550, A-595, A-641, A-656, A-661, A-675, and A-113 whereby plaintiff agreed, among other things, to manufacture, assemble, inspect, test, deliver and warrant reactor vessel and closure head assemblies, including responsibility for the "design adequacy" of said reactor vessel and closure head assemblies under the conditions therein stated, in consideration for which defendant agreed to pay plaintiff therefor an aggregate price of Ninety-One Million Eight Hundred Twenty-Seven Thousand Three Hundred and Eighty-Eight ($91,827,388) Dollars, as more specifically provided in said contracts.

109. In the course of manufacture of the closure heads, plaintiff encountered dimensional and "fit-up" problems in installing parts thereof known as the "insulation and canning", the solution of which required that changes be made in said insulation and canning as called for by the contract drawings in order to install the same satisfactorily and as contemplated by the contract specifications.

110. Plaintiff made the changes and performed the work incident thereto at the order, direction or request of the defendant and defendant has accepted the results thereof.

111. The aforesaid changes made by plaintiff in the insulation and canning constituted changed, extra or substituted work over and above the base work included in the prices of the respective contracts on account of which defendant is liable to

plaintiff for additional compensation by way of an increase in price or damages.

112. Plaintiff has demanded said price increase or damages and defendant has failed and refused to pay the same.

WHEREFORE, plaintiff demands judgment against defendant as follows:

A. For compensatory damages, general and special;

B. For interest and costs of suit;

C. For attorneys fees.

FIFTEENTH COUNT

113. Plaintiff repeats and realleges all of the allegations contained in Paragraphs 1 through 13, inclusive, and Paragraph 108, as if set forth at length herein.

114. Through mutual mistake of the parties, or through mistake on the part of the plaintiff coupled with misrepresentations or other inequitable conduct on the part of the defendant, the said contracts did not fully and truly express the intention and meaning of the parties as to the conditions, scope or degree of plaintiff's responsibility for the design adequacy of the closure heads insofar as the "insulation and canning" were concerned.

115. The mutual mistake consisted of a failure of the parties to express their understanding that defendant was neither allowing the time that would be required for, nor was it paying for a full design review of all aspects of the design of the

components, that the components had already been built successfully by other contractors, and that plaintiff would only be required to perform a "design audit" to verify that the components as designed would comply with the operating and environmental conditions stated in the specifications.

116. Consequently, plaintiff's design adequacy responsibility did not include the dimensional and fit-up problems that were encountered in installing the insulation and canning.

117. The misrepresentations or other inequitable conduct on the part of the defendant consisted of its representation to plaintiff that the closure heads here in question had been successfully built by previous contractors in accordance with the drawings supplied by defendant, and defendant's failure to disclose to plaintiff that dimensional and fit-up problems respecting the insulation and canning of closure heads made by previous contractors had been encountered.

118. But for the mutual mistake, or the mistake of plaintiff and misrepresentations or other inequitable conduct of defendant, plaintiff would have had no responsibility to make the abovementioned changes required to manufacture the closure heads aforesaid except upon payment therefor as for changed, extra or substituted work.

119. As a result of the foregoing, defendant is liable to plaintiff for additional compensation by way of a price increase or damages.

120. Plaintiff has no adequate remedy at law.

WHEREFORE, plaintiff demands judgment against defendant as follows:

A. That the affected contracts be reformed to provide that resolution of the dimensional and fit-up problem encountered in installing the insulation and canning constitutes changed, extra or substituted work for which plaintiff is entitled to additional compensation in the amount of $251,973.00;

B. That upon the contracts being so reformed, for an accounting, and for the payments due under the contracts as reformed;

C. For such other sums as defendant may be found, on accounting, to be indebted to the plaintiff under said reformed contracts;

D. For such damages as plaintiff has sustained or may sustain as a result of any refusal or failure of defendant to perform its obligations under the aforesaid contracts as reformed;

E. For such further and other relief as plaintiff may be entitled to.

SIXTEENTH COUNT

121. Plaintiff repeats and realleges all of the allegations contained in Paragraph 1 through 13, inclusive, and Paragraph 63 as if set forth at length herein.

122. In the case of Purchase Order Nos. A-595, A-641, and A-656, plaintiff was not responsible for the design adequacy of the closure heads being manufactured thereunder inasmuch as the conditions under which it was to become responsible were not satisfied.

123. Until said conditions were satisfied, defendant is liable under said contracts in the case of any inadequacies in the design of the closure heads, as depicted in the contract drawings, to pay plaintiff additional compensation by way of a price increase or damages for any changes in said closure heads and the drawings thereof in order to make the design conform to the requirements of the specifications.

124. Plaintiff has fully preformed all the conditions of the contracts on its part and has claimed additional compensation under Purchase Order Nos. A-595, A-641, and A-656 on account of said changes, and defendant has failed and refused to pay the same.

WHEREFORE, plaintiff demands judgment against defendant as follows:

A. For compensatory damages, general and special;

B. For interest and costs of suit;

C. For attorneys fees.

CRUMMY, DEL DEO, DOLAN
& PURCELL
Attorneys for Plaintiff

s/ Peter E. Henry
Peter E. Henry

DEMAND FOR TRIAL BY JURY

Please take notice that plaintiff demands trial by jury of all issues so triable.

CRUMMY, DEL DEO, DOLAN
& PURCELL
Attorneys for Plaintiff

s/ Peter E. Henry
Peter E. Henry

ANSWER AND COUNTERCLAIM, FILED AUGUST 25, 1976

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 76-794

[TITLE OMITTED]

ANSWER AND COUNTERCLAIM

ANSWER

Defendant General Electric Company Answers the Complaint of Plaintiff Curtiss-Wright Corporation, as follows:

1. Defendant admits that there is diversity among the parties but denies that this is an action within the jurisdiction of this Court for the reasons set forth in Fourth, Thirteenth and Fourteenth Defenses set forth below.

2. Admitted.

3. Admitted.

4. Defendant admits that it is engaged, through its Machinery Apparatus Operation, in the business, among others, of purchasing nuclear propulsion plant components on behalf of the United States Navy. Defendant denies that it purchases such components for resale to the Navy.

5. Admitted.

6. Denied for the reasons set forth in the Fourth, Thirteenth and Fourteenth Defenses.

7. Admitted.

Answer and Counterclaim

FIRST COUNT

8. Defendant admits that, during the period specified, discussions and later negotiations were held regarding the possibility of Plaintiff becoming a supplier of large components used in the construction of nuclear propulsion plants for Naval vessels. Defendant avers that said discussions and negotiations resulted from the mutual interests of Plaintiff in entering this field of endeavor and the needs of the Navy. Defendant avers on information and belief that such discussions and/or negotiations did not occur in meetings at which all three parties were present. Defendant denies the remaining allegations of Paragraph 8.

9. Admitted.

10. Defendant admits that it was seeking to develop a new source of supply for the aforesaid components, and that it projected a future need for said new source of supply. Defendant denies the remaining allegations of Paragraph 10.

11. Defendant admits that Plaintiff had engaged in the business of manufacturing aircraft engines and missile cases and that it had not actually manufactured nuclear components of the kind called for in the contracts giving rise to this litigation, although Plaintiff had manufactured other items for the Naval Nuclear Program. Defendant avers that Plaintiff represented, among other things, that its experience in other manufacturing endeavors was transferrable to the Naval Nuclear Program. Defendant denies the remaining allegations of Paragraph 11.

12. Defendant admits that it was aware that Plaintiff had no prior experience in the actual manufacture of the particular nuclear components for the Naval Nuclear Program which were the subject of the contracts giving rise to this litigation. Defendant denies that it knew the extent of Plaintiff's experience

and capabilities to the same degree that Plaintiff knew its own experience and capabilities. Defendant denies the remaining allegations of Paragraph 12.

13. Denied.

14. Defendant admits that, acting on the Navy's behalf, it entered into 21 contracts with Plaintiff relating to the manufacture and sale of nuclear components in the period specified. Defendant denies the remaining allegations of Paragraph 14.

15. Defendant admits that the contracts were designated as purchase orders with the numbers set forth in the Complaint and that Plaintiff agreed, among other obligations under said purchase orders, to manufacture, assemble, inspect, test, sell and deliver certain nuclear components. Defendant denies that said components were sold and delivered to it; and avers that they were sold and delivered to the Navy. Defendant further avers that by its calculation the total number of units was 162. Defendant further states that, although the aggregate price of said purchase orders is approximately as alleged in the Complaint, in view of change orders and other adjustments the exact total is subject to qualification and interpretation. Defendant denies the remaining allegations of Paragraph 15.

16. Denied.

17. Denied.

18. Dcnied.

19. Denied.

20. Denied.

21. Denied.

SECOND COUNT

22. Defendant admits and denies the allegations of Paragraph 22 of the Complaint in the manner set forth in Paragraphs 1 through 21, inclusive, of this Answer.

23. Denied.

24. Denied.

25. Denied.

THIRD COUNT

26. Defendant admits and denies the allegations of Paragraph 26 of the Complaint in the manner set forth in Paragraphs 1 through 16, inclusive, of this Answer.

27. Denied.

28. Denied.

29. Denied.

30. Denied.

FOURTH COUNT

31. Defendant admits and denies the allegations of Paragraph 31 of the Complaint in the manner set forth in Paragraphs 1 through 16, inclusive, of this Answer.

32.-33. Paragraphs 32 and 33 of the Complaint set forth legal conclusions as to which no answer is required; however, if

an answer is required, Defendant denies the allegations of Paragraphs 32 and 33.

34. Denied.

35. Denied.

36. Defendant admits that Plaintiff incurred capital expenditures relating to the performance of the purchase orders. Defendant denies for lack of information the allegations of alleged losses incurred by Plaintiff. Defendant avers that Plaintiff's entry into this business, its signing of the purchase orders, and its making of any investments with respect to the Naval Nuclear Program were the result of business judgments made by Plaintiff, an experienced and substantial firm. Defendant denies the remaining allegations of Paragraph 36.

37. Denied.

FIFTH COUNT

38. Defendant admits and denies the allegations of Paragraph 38 of the Complaint in the manner set forth in Paragraphs 1 through 16, inclusive, of this Answer.

39. Paragraph 39 sets forth a legal conclusion as to which no answer is required; however, if an answer were required, Defendant denies the allegations of Paragraph 39.

40. Denied.

41. Denied.

42. Denied.

43. Denied.

44. Denied.

SIXTH COUNT

45. Defendant admits and denies the allegations of Paragraph 45 of the Complaint in the manner set forth in Paragraphs 1 through 15, inclusive, of this Answer.

46. Denied.

47. Defendant avers that as part of the business relationship between it and Plaintiff, it was understood that Defendant would provide reasonable cooperation, consistent with the contract terms, in furnishing Plaintiff such information pertinent to the performance of the agreements as Defendant possessed but Plaintiff did not. Defendant further avers that said understanding is not contained in any formal agreements, other than as it is implict in the review process provided for in the contracts. Defendant further avers at all times during the course of its business relationship with Plaintiff it not only acted in full conformity with that understanding, but provided Plaintiff with valuable assistance far beyond any requirements of the contract. Defendant denies the remaining allegations of Paragraph 47.

48. Denied.

49. Defendant admits that the listed purchase orders were entered into with Plaintiff, but denies that said actions were "[i]n reliance on said agreement." Defendant denies the remaining allegations of Paragraph 49.

50. Defendant admits that Plaintiff made certain capital expenditures for construction of a separate factory building and

for special purpose facilities. Defendant denies that any such actions of Plaintiff were "[i]n further reliance on said agreement." Defendant denies the remaining allegations of Paragraph 50.

51. Defendant avers that, in accordance with the understanding described in Paragraph 47 of this Answer, from time to time it received from Plaintiff certain information concerning the manner, methods, processes and procedures for manufacturing the components to be delivered, and that it from time to time commented on said information. Defendant further avers that, under the contractual relationships, Plaintiff had the legal duty to devise appropriate manners, methods, processes and procedures that conformed to the Navy's specifications or other requirements. Defendant further avers that it provided Plaintiff with such knowledge or information as was requested or appropriate as set forth in Paragraph 47 of this Answer. Defendant denies the remaining allegations of Paragraph 51.

52. Denied.

53. Defendant admits that Plaintiff made capital expenditures relating to the performance of the purchase orders. Defendant denies for lack of information the allegations that Plaintiff incurred losses in the performance of the purchase orders. Defendant denies the remaining allegations of Paragraph 53.

SEVENTH COUNT

54. Defendant admits and denies the allegations of Paragraph 54 of the Complaint in the manner set forth in Paragraphs 45 through 47, inclusive, of this Answer.

55. Denied.

56. Defendant admits that in the early discussions between Plaintiff and Defendant it was not anticipated that Plaintiff's participation in the Naval Nuclear Program would be "temporary" or that it was related to "temporary" build-ups. Defendant denies, however, that there was any representation, agreement, or assurance as to the scope of the future business to be available to Plaintiff. Defendant further avers that the availability of such business was a matter within the control of persons other than Defendant, including the United States Congress and the Navy. Defendant denies the remaining allegations of Paragraph 56.

57. Denied.

58. Denied.

59. Defendant denies for lack of information the allegations that Plaintiff's cost of performing the 21 contracts exceeded the contract prices. Defendant denies the remaining allegations of Paragraph 59.

60. Denied.

61. Denied.

EIGHTH COUNT

62. Defendant admits and denies the allegations of Paragraph 62 of the Complaint in the manner set forth in Paragraphs 1 through 16, inclusive, of this Answer.

63. Admitted, except that Defendant denies the allegation that such awards or purchase orders were "as aforesaid."

63. Defendant avers that specifications of the components to be manufactured, and qualifications of welders, weld operators, welding procedures, welding equipment, testing procedures, and other items were contained in Navy documents which were incorporated by reference in the purchase orders. Defendant further avers that said documents speak for themselves as to their requirements and that Plaintiff's characterization of them is incomplete. Defendant denies the remaining allegations of Paragraph 63.

64. Denied.

65. Denied.

66. Defendant admits that Plaintiff produced components which failed to meet the specified physical characteristics and which necessitated substantial amounts of rework. Defendant denies that said failure occurred through any action or inaction of Defendant, and further denies the remaining allegations of Paragraph 66.

67. Defendant admits that Plaintiff's welding personnel, although "qualified" in the sense that they had obtained certain required certificates, had to undergo extensive additional training and learning before they were able to produce components meeting specifications. Defendant avers that this failure of Plaintiff to provide personnel able to do the job correctly did not result from any action or inaction of Defendant, and resulted in substantial delays and expenses to Defendant. Defendant denies the remaining allegations of Paragraph 67.

68. Defendant admits that both it and Plaintiff, as well as the Navy, ultimately became aware of Plaintiff's inability or difficulty in producing components meeting specifications.

Defendant denies that this awareness resulted from Plaintiff's giving of "notice." Defendant denies the remaining allegations of Paragraph 68.

69. Denied.

70. Denied.

NINTH COUNT

71. Defendant admits and denies the allegations of Paragraph 71 of the Complaint in the manner set forth in Paragraphs 1 through 16, inclusive, of this Answer.

72. Denied.

73. Denied.

74. Defendant admits that Plaintiff may have made a mistake of business judgment in assessing its own capability to perform the contracts and earn a profit upon them. Defendant denies the remaining allegations of Paragraph 74.

75. Defendant avers that it believed at the outset of its relationship with Plaintiff that Plaintiff did possess the capability required to produce the components, without extreme difficulty and unusual expense. Defendant avers, however, that at all times it was contemplated that additional training, learning, and practice would be required in order for personnel of Plaintiff to be able to accomplish the required work. Defendant denies the remaining allegations of Paragraph 75.

76. Defendant avers that, based largely upon the representations made by the Plaintiff to Defendant and Defendant's assumption that Plaintiff would perform in a

workmanlike manner, Defendant anticipated that Plaintiff would be able to perform the contracts and earn a reasonable profit thereon. Defendant further avers that the profitability of these contracts was subject to risks as is the case with all fixed-price contracts. Defendant denies the remaining allegations of Paragraph 76.

77. Defendant denies for lack of knowledge the allegation that Plaintiff incurred losses in the performance of the purchase orders. Defendant denies the remaining allegations of Paragraph 77.

78. Denied.

79. Denied.

TENTH COUNT

80. Defendant admits and denies the allegations of Paragraph 80 of the Complaint in the manner set forth in Paragraphs 1 through 16, inclusive, of this Answer.

81. Defendant denies for lack of information the allegation that Plaintiff made a unilateral mistake in negotiating provisions of the contract regarding the subjects set forth in Paragraph 81 of the Complaint. Defendant denies that the inclusion or exclusion of any provisions in the contracts was attributable to or resulted from or in any misrepresentation or other inequitable conduct by the Defendant. Defendant denies the remaining allegations of Paragraph 81.

82. Defendant admits that Plaintiff underestimated the difficulty of the work. Defendant denies the remaining allegations of Paragraph 82.

83. Defendant denies for lack of information the allegations of Paragraph 83 concerning the reasons for and substance of Plaintiff's alleged unilateral mistake. Defendant denies the remaining allegations of Paragraph 83.

84. Denied.

85. Denied.

86. Denied.

ELEVENTH COUNT

87. Defendant admits and denies the allegations of Paragraph 87 of the Complaint in the manner set forth in Paragraphs 1 through 16, inclusive, and Paragraphs 81 through 84, inclusive, of this Answer.

88. Denied.

89. Denied.

TWELFTH COUNT

90. Defendant admits and denies the allegations of Paragraph 90 of the Complaint in the manner set forth in Paragraphs 1 through 16, inclusive, of this Answer.

91. Defendant admits that beginning in or about May 1971, Plaintiff, at the request of the Navy as well as Defendant, repeated x-ray testing of certain welds which Plaintiff had made. Defendant denies that Plaintiff was "ordered and directed" by Defendant to perform such tests. Defendant denies for lack of information the allegation that Plaintiff had already found said welds to meet specifications. Defendant denies the remaining allegations of Paragraph 91.

92. Defendant admits that a request that x-ray testing be repeated was made in or about May 1971, and that such request was prompted by a complaint made by an employee of Plaintiff. Defendant avers that said complaint was not only that x-rays of welds were not done in accordance with specifications, but that there had been falsification of radiographic inspection records. Defendant denies that it gave Plaintiff any "order and direction." Defendant denies the remaining allegations of Paragraph 92.

93. Defendant denies that it gave Plaintiff any "order and direction." Defendant admits that some of its employees had some information as to how x-ray testing was performed but denies that it "participated" in that testing. Defendant further avers that said testing and the manner of its performance was the responsibility of Plaintiff. Defendant denies the remaining allegations of Paragraph 93.

94. Defendant admits that Plaintiff performed certain x-ray tests but denies that Defendant "accepted the results thereof." Because it is not clear as to what Plaintiff means by "said work", Defendant is unable fully to answer Paragraph 94 of the Complaint and therefore denies it. Defendant denies the remaining allegations of Paragraph 94.

95. Denied.

96. Denied.

97. Defendant admits that Plaintiff experienced difficulty in timely detecting and correcting defective and inadequate welds and weld practices as they occurred. Defendant denies the remaining allegations of Paragraph 97.

98. Denied.

THIRTEENTH COUNT

99. Defendant admits and denies the allegations of Paragraph 99 of the Complaint in the manner set forth in Paragraphs 1 through 16, inclusive, of this Answer.

100. Defendant admits that it was recommended to Plaintiff that it change the procedures used to perform magnetic particle testing. Defendant denies that said recommendations occurred in or about October 1973, and avers that such recommendations were made at least as early as June 1972. Defendant denies the remaining allegations of Paragraph 100.

101. Defendant admits that it as well as the Government conducted periodic surveillance audits of Plaintiff's testing. Defendant avers that, under the contracts, final responsibility for all these aspects of performance, training, and testing was placed on Plaintiff. Defendant denies the remaining allegations of Paragraph 101.

102. Denied.

103. Denied.

104. Denied.

105. Denied.

106. Denied.

FOURTEENTH COUNT

107. Defendant admits and denies the allegations of Paragraph 107 of the Complaint in the manner set forth in Paragraphs 1 through 13, inclusive, of this Answer.

108. Defendant admits that, acting on behalf of the Navy, it awarded contracts to Plaintiff designated as purchase orders with the numbers set forth in Paragraph 108, and that Plaintiff agreed, among other things, to undertake the duties set forth in Paragraph 108. Defendant avers that the purchase orders speak for themselves as to their contents. Because "the times and places abovementioned" are not specified Defendant denies that allegation of Paragraph 108. Defendant admits that the aggregate purchase price of the eight specified purchase orders is approximately as alleged in Paragraph 108, but avers that the exact aggregate purchase price may be subject to qualification and interpretation. Defendant denies the remaining allegations of Paragraph 108.

109. Defendant admits that in the course of manufacturing closure heads Plaintiff encountered dimensional and "fit-up" problems in installing parts known as "insulation and canning." Defendant further admits that the resolution of these problems required that changes be made in insulation and canning as shown in buyer-furnished drawings, but avers that the allegation of the Complaint is incomplete and misleading in that, under the contracts, design responsibility for such changes was on Plaintiff. Defendant denies the remaining allegations of Paragraph 109.

110. Denied.

111. Denied.

112. Defendant admits that Plaintiff demanded a price increase for the matters alieged in the Fourteenth Count of the Complaint, but denies that Defendant has "failed and refused to pay the same." Defendant instead avers that a request for a change by Plaintiff has not yet been acted upon. Defendant denies the remaining allegations of Paragraph 112.

FIFTEENTH COUNT

113. Defendant admits and denies the allegations of Paragraph 113 of the Complaint in the manner set forth in Paragraphs 1 through 13, inclusive, and Paragraph 108 of this Answer.

114. Denied.

115. Denied.

116. Denied.

117. Denied.

118. Denied.

119. Denied.

120. Denied.

SIXTEENTH COUNT

121. Defendant admits and denies the allegations of Paragraph 121 of the Complaint in the manner set forth in Paragraphs 1 through 13, inclusive, and Paragraph 63 of this Answer.

122. Paragraph 122 primarily sets forth a legal conclusion as to which no answer is required; however, insofar as an answer is required, the allegations of Paragraph 122 are denied.

123. Paragraph 123 of the Complaint sets forth a legal conclusion as to which no answer is required; however, if an answer is required, Defendant denies the allegations of Paragraph 123.

124. Defendant admits that Plaintiff has claimed additional compensation under the specified purchase orders. Defendant denies that Plaintiff has fully performed all the conditions of said contracts. Defendant further denies that it has failed and refused to pay the additional compensation requested by Plaintiff under said purchase orders and avers that the claim has not yet been acted upon. Defendant denies the remaining allegations of Paragraph 124.

FIRST DEFENSE

The Complaint fails to state a claim on which relief can be granted.

SECOND DEFENSE

The claims asserted in the Complaint are barred by the statute of limitations.

THIRD DEFENSE

Any equitable claims asserted in the Complaint which are not barred by the statute of limitations, are barred by laches.

FOURTH DEFENSE

At all times pertinent to the Complaint, and in the performance of its duties relating to the formation and implementation of the contracts which are the subject of the Complaint, Defendant acted on behalf of the Navy. Accordingly;

(a) The claims asserted in the Complaint which sound in tort are barred by the exceptions to the Federal Tort Claims Act, 28 U.S.C. §2680(a) and (h), for discretionary functions, misrepresentation, deceit or interference with contract rights.

(b) Defendant is immune from tort liability in this case under the official immunity doctrine.

(c) The claims asserted in the Complaint which sound in contract cannot be brought to this Court because the claims asserted exceed $10,000, the jurisdictional limit of the Tucker Act, 28 U.S.C. §1346(a).

FIFTH DEFENSE

Any claims asserted in the Complaint based upon fraud or mistake are not stated with particularity and accordingly are fatally defective under Rule 9(b), Federal Rules of Civil Procedure.

SIXTH DEFENSE

Any claims asserted in the Complaint based upon alleged "negligence" of Defendant are barred by the contributory negligence of Plaintiff.

SEVENTH DEFENSE

Plaintiff's claims are barred by its failure to seek relief or exhaust its remedies under the "Changes, Extras and Substitutions" clause of each of the purchase orders.

EIGHTH DEFENSE

Plaintiff's claims are barred by its agreement in the aforesaid "Changes, Extras and Substitutions" clause, that:

> "Buyer will not pay for additional work or extras unless such work or extras have been ordered in writing and the price therefor agreed upon.

Changes made by Seller without an authorized Change Order or Amendment shall be made at the sole risk of Seller, there being no financial recourse against Buyer."

NINTH DEFENSE

Any claims asserted in the Complaint based upon (a) inspections or testing of any work, or approvals of design, drawings, samples, test results, procedures or schedules by the Government or by Defendant; or (b) requirements by the Government or Defendant that Plaintiff correct defects in its work, are barred by the "Inspection" clause of each of the purchase orders, and by the administrative specifications.

TENTH DEFENSE

The Counts of the Complaint asserting "agreements" of Defendant which are not set forth in the purchase orders are barred by the "Contract Rights" clause of these orders.

ELEVENTH DEFENSE

Plaintiff is estopped from maintaining this action or from recovering upon the claims asserted in its Complaint by virtue of various actions taken by it, and/or by failures by it to act, upon which Defendant relied, including but not limited to the following:

(a) Its representations made prior to the formation of its contractual relationship with Defendant, in order to induce Defendant and the Navy to approve it as a contractor for the large components used in the Naval Nuclear Program, that Plaintiff had the expertise and capabilities to perform the contracts satisfactorily in accordance with the Navy's

requirements, and to perform highly skilled work of the type and magnitude required by the Naval Nuclear Program.

(b) Its entry into fixed-price contracts, which are by their very nature inconsistent with Plaintiff's present position that it was assured a profit.

(c) Its agreement to or acquiescence in the activities, such as inspections, additional x-rays, re-welding, etc., which are the subject of the Complaint.

(d) Its inducing of Defendant and the Navy to approve it as contractor for additional purchase orders, and its entry into additional purchase orders, without its having raised any complaints regarding older purchase orders.

(e) Its failure to raise the claims now asserted, while the contracts were being implemented, and despite the extraordinary assistance rendered to Plaintiff by Defendant which benefitted Plaintiff greatly and which prevented Plaintiff from suffering great losses on the purchase orders and/or totally defaulting on them.

(f) Its filing of a request for relief under Public Law 85-804, and various representations and admissions made in conjunction therewith, including that Plaintiff had no adequate judicial remedy and that its losses resulted from Plaintiff's own misjudgments as to the requirements and difficulty of the work.

TWELFTH DEFENSE

The claims asserted in the Complaint have been waived and abandoned by Plaintiff, in light of the considerations set forth in the Eleventh Defense.

THIRTEENTH DEFENSE

The United States is a party that must be joined as to all counts of the Complaint seeking reformation or rescission, since it must approve all modifications or changes or cancellations of contracts in excess of $10,000 between Defendant and Plaintiff. Since the equitable relief sought in the Complaint is incapable of performance those counts seeking such relief must be dismissed under Rule 19, Federal Rules of Civil Procedure.

FOURTEENTH DEFENSE

Counts 3, 5, 9, 10, 11, 15 of the Complaint seeking reformation or rescission are barred by the doctrine of sovereign immunity.

FIFTEENTH DEFENSE

Plaintiff's requests for equitable relief are barred because it comes into Court with unclean hands.

SIXTEENTH DEFENSE

The Complaint must be dismissed as violative of Rule 8, Federal Rules of Civil Procedure, in that its statements of claims are not "short and plain" and its averments are not "simple, concise, and direct."

SEVENTEENTH DEFENSE

During the course of the performance of the contracts, Plaintiff failed (a) to perform its obligations in a workmanlike manner; (b) to establish on a timely basis adequate quality control programs and procedures; (c) to use personnel with

adequate competence and training in its quality control program, and in production tasks; (d) to supply adequate tooling, machinery and testing equipment; and (e) to establish and implement adequate testing and inspection programs. As a result, Plaintiff produced faulty materials which had to be reworked and retested, caused delays in production and delivery of the components, and caused great additional expense, the costs and damage of which which (sic) must be set-off against any recovery by Plaintiff.

WHEREFORE, Defendant General Electric Company demands that the Complaint be dismissed with prejudice; that costs and its attorney's fees be awarded to Defendant; and that the Court grant to Defendant such other, further and additional relief as may be just and proper.

COUNTERCLAIM

1. During the period 1968 through 1972, Defendant on behalf of the Navy and Plaintiff entered into contracts designated as Purchase Order Nos. A-550, A-595, A-641, A-642, A-656, A-661, B-382, B-423, B-428, B-412, B-433, B-443, B-384, B-425, B-429, B-410, A-675, A-113, B-451, B-452 and B-478.

2. Plaintiff agreed under each of the aforesaid purchase orders to manufacture, for delivery to the Navy, certain large components for use in the construction of nuclear propulsion plants for Naval vessels.

3. Under the aforesaid purchase orders, Plaintiff agreed and undertook the obligations, among others, of training welders and other personnel to Navy requirements; of furnishing and using employees competent to perform welding, weld-testing and other skilled tasks contemplated by the agreements; and of constructing the components to Navy specifications and to deliver the components in accordance with specified delivery schedules.

4. Plaintiff agreed and was obligated to furnish and use adequate tooling, machinery and testing equipment to perform the work under the purchase orders in a timely and workmanlike manner, consistent with the high standards of the Naval Nuclear Program.

5. Plaintiff did not perform its obligations under the agreement in a competent, workmanlike manner in that:

(a) Its management did not establish quality control programs and procedures adequate or in time to assure the production of components of the high quality and on the schedule required for the Navy's program, and did not use personnel with sufficient competence and training to carry out a quality control program of the sophistication required for work of the nature required by the purchase orders.

(b) It failed to establish adequate training programs for welders.

(c) It failed to supply welders with the ability to perform the required work correctly and timely.

(d) Its employees produced numerous defective welds, and failed to find defects in its welds.

(e) It failed to supply tooling, machinery, and testing equipment adequate to perform the work as required and in a timely fashion, but instead supplied inadequate and old tooling, machinery and testing equipment.

(f) It failed to establish and implement testing and inspection programs and practices adequate to find and correct construction defects in a timely and efficient manner.

6. Each of the defects in its performance as set forth in Paragraph 5 above was pointed out to Plaintiff by representatives of the Navy and/or Defendant, who made specific recommendations to assist Plaintiff in curing the defects, and/or avoiding future or repeated defects. Plaintiff either failed to accept the recommendations, failed to carry out fully recommendations which it did accept, or did so in an untimely manner after further delays and expenditures had resulted from its actions.

7. As a direct result of the matters set forth in Paragraphs 5 and 6 above, substantial delays occurred in the progress of the work which Plaintiff was obligated to perform, numerous errors were made by Plaintiff in the production and testing of the components which Plaintiff was obligated to deliver, much of the work which Plaintiff performed had to be redone, and much work had to be deferred while Plaintiff corrected its errors and belatedly revised its quality control, testing and training programs.

8. Also as a direct result of the matters set forth in Paragraphs 5 and 6 above, it became necessary for Defendant to make extraordinary efforts, far beyond those contemplated by the contract or anticipated as a part of the normal cooperation of contracting parties acting in good faith, in order to prevent a major default in the performance of its and Plaintiff's obligations to the Navy. Defendant's efforts included special assistance to Plaintiff to help it to correct its deficiencies in each of the areas set forth in Paragraph 5 above and to establish quality control and testing programs adequate to meet the high standards of the Naval Nuclear Program.

9. Defendant's provision of intensive and special assistance to Plaintiff conferred great benefits upon Plaintiff, in that (a) Defendant performed work which was the contractual

responsibility of Plaintiff; (b) prevented substantial losses which otherwise would have befallen Plaintiff; and (c) averted a probable total default in contract performance by Plaintiff and the termination of Plaintiff's position as a supplier of large components to the Naval Nuclear Program.

10. Defendant has not been compensated in whole or in any part, for the benefits it conferred upon Plaintiff nor for the losses to Plaintiff which Defendant's efforts averted.

11. Plaintiff caused great increases in the costs of the production and delivery of the nuclear components required by the purchase orders, which costs in part were passed on to, and borne by, the Navy.

12. At all times pertinent hereto, in its relationship with Plaintiff, Defendant was a contractor of the Navy and was acting on the Navy's behalf.

COUNT I

13. Defendant repeats and realleges the allegations of Paragraphs 1-12, inclusive, of this Counterclaim.

14. Plaintiff breached its obligations under the purchase orders to manufacture and deliver said components for the Naval Nuclear Program.

15. Said breaches by Plaintiff of its obligations resulted in substantial damages, which Defendant is entitled to recover from Plaintiff for the ultimate benefit of the United States.

COUNT II

16. Defendant repeats and realleges the allegations of Paragraphs 1-12, inclusive, of this Counterclaim.

17. Plaintiff impliedly warranted that it would perform the obligations under the purchase orders in a workmanlike manner, and would provide competent management, adequate tools and machinery, adequate training and testing procedures, and adequate quality control procedures.

18. Plaintiff breached the warranty described in Paragraph 17 above.

19. Said breach by Plaintiff of its warranty resulted in substantial damages, which Defendant is entitled to recover from Plaintiff for the ultimate benefit of the United States.

COUNT III

20. Defendant repeats and realleges the allegations of Paragraphs 1-12, inclusive, of this Counterclaim.

21. During the negotiations leading up to Plaintiff's entry into the Naval Nuclear Program, Plaintiff represented that it was competent to manufacture and deliver large components for the Naval Nuclear Program; and that its experience in aerospace projects qualified it to perform the necessary tasks, including welding of large components for the Naval Nuclear Program.

22. During the performance of the purchase orders set forth in Paragraph 1 of this Counterclaim, Plaintiff represented that it was capable of instituting and would institute additional quality control procedures, and that it would apply or install tooling, machinery, training and testing procedures, and use personnel, adequate to manufacture the items in a timely and workmanlike manner consistent with the high standards of the Naval Nuclear Program.

23. The representations described in Paragraph 21 and 22 were made to induce Defendant and the Navy to accept Plaintiff as a contractor for large components in the Naval Nuclear Program, to agree to enter into or approve additional purchase orders with Plaintiff, and/or to refrain from declaring Plaintiff in default, as they had a right to do in view of the acts and omissions alleged in Paragraphs 1-12.

24. Defendant and the Navy relied upon the aforesaid representations of Plaintiff in accepting Plaintiff as a supplier, in issuing it additional purchase orders, and in not terminating it for default.

25. The aforesaid representations were false and unfounded and were not carried out by Plaintiff.

26. Said representations by Plaintiff, and Plaintiff's failure to carry out these representations, resulted in substantial damages, which Defendant is entitled to recover from Plaintiff for the ultimate benefit of the United States.

COUNT IV

27. Defendant repeats and realleges the allegations of Paragraphs 1-12 and 21-26, inclusive, of this Counterclaim.

28. By virtue of the representations set forth in Paragraphs 21-26, Plaintiff expressly warranted its ability and capacity to perform in a timely and workmanlike manner the work required by the purchase orders, consistent with the high standards of the Naval Nuclear Program.

29. Plaintiff breached the warranty described in Paragraph 28 above.

30. Said breach by Plaintiff of its warranty resulted in substantial damages, which Defendant is entitled to recover from Plaintiff for the ultimate benefit of the United States.

COUNT V

31. Defendant repeats and realleges the allegations of Paragraphs 1-30, inclusive, of this Counterclaim.

32. As the result of Defendant's assistance to Plaintiff in the performance of Plaintiff's contractual duties, as alleged in Paragraph 9 of this Counterclaim, Plaintiff has been unjustly enriched.

33. Plaintiff is liable to Defendant for the benefits conferred, or losses to Plaintiff prevented, through Defendant's actions.

WHEREFORE, Defendant demands as relief from Plaintiff the following damages:

1. The damages and additional costs incurred as a result of the actions and inactions of Plaintiff complained of in this Counterclaim.

2. The value of the benefits and avoidance of losses conferred upon Plaintiff through Defendant's efforts alleged in Paragraph 32 and 33 of this Counterclaim.

3. Defendant's costs, disbursements and attorney's fees of this litigation.

4. Such other, further and additional relief as to this Court may seem just and proper.

COLE AND GRONER, P.C.

By _____
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WALTER H. FLEISCHER
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REPLY TO COUNTERCLAIM, FILED OCTOBER 15, 1976

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 76-794

(Judge Coolahan)

[TITLE OMITTED]

Curtiss-Wright Corporation replies to the Counterclaim herein of General Electric Company as follows:

1. Plaintiff admits that it entered into various contracts with defendant as designated by the purchase order numbers set forth in paragraph 1 of the Counterclaim, except that No. B-443 should be B-442, but denies that it entered into said contracts with the Navy directly or with defendant on behalf of the Navy.

2. Plaintiff avers that the aforesaid purchase orders speak for themselves, but admits that the components manufactured by it are and were intended for use in the construction of nuclear propulsion plants for Naval vessels.

3. Plaintiff denies the allegations of paragraph 3 of the Counterclaim and avers that the aforesaid purchase orders speak for themselves concerning plaintiff's obligations set forth therein. Plaintiff further avers that it is entitled to have its agreements and obligations as set forth in the purchase orders modified and reformed by reason of the matters set forth in the Complaint.

4. Plaintiff denies the allegations of paragraph 4 of the Counterclaim and avers that the aforesaid purchase orders speak for themselves concerning plaintiff's obligations set forth therein. Plaintiff further avers that is is entitled to have its agreements and obligations as set forth in the purchase orders modified and reformed by reason of the matters set forth in the Complaint.

Reply to Counterclaim

5. Plaintiff denies each and every allegation set forth in paragraph 5 of the Counterclaim.

6. Plaintiff denies each and every allegation of paragraph 6 of the Counterclaim.

7. Plaintiff denies each and every allegation of paragraph 7 of the Counterclaim.

8. Plaintiff denies each and every allegation of paragraph 8 of the Counterclaim.

9. Plaintiff denies each and every allegation of paragraph 9 of the Counterclaim.

10. Plaintiff denies that defendant's efforts averted any losses to plaintiff or that defendant conferred upon plaintiff any benefits or that defendant is entitled to compensation from plaintiff.

11. Plaintiff denies each and every allegation of paragraph 11 of the Counterclaim.

12. Plaintiff admits that defendant was a contractor of the Navy but denies the remaining allegations of paragraph 12 of the Counterclaim.

COUNT I

13. Plaintiff repeats and realleges its responses to paragraphs 1 through 12 of the Counterclaim as if set forth at length herein.

14. Plaintiff denies each and every allegation of paragraph 14 of the Counterclaim.

Reply to Counterclaim

15. Plaintiff denies each and every allegation of paragraph 15 of the Counterclaim.

COUNT II

16. Plaintiff repeats and realleges its responses to paragraphs 1 through 12 of the Counterclaim as if set forth at length herein.

17. Plaintiff denies each and every allegation of paragraph 17 of the Counterclaim.

18. Plaintiff denies each and every allegation of paragraph 18 of the Counterclaim.

19. Plaintiff denies each and every allegation of paragraph 19 of the Counterclaim.

COUNT III

20. Plaintiff repeats and realleges its responses to paragraphs 1 through 12 of the Counterclaim as if set forth at length herein.

21. Plaintiff denies each and every allegation of paragraph 21 of the Counterclaim. Any statement, written or otherwise, by plaintiff with respect to its competence to manufacture and deliver large components for the Naval nuclear program resulted directly from and were dependent upon defendant's assurances, agreements, representations, and warranties to plaintiff as set forth in paragraphs 13, 16(b), 16(c), 46-48, 64, 65 and 82 of the Complaint in this action, or were based upon the mutual mistake of the parties as set forth in the Ninth Count of the Complaint, or were based upon the mistake of plaintiff and the misrepresentations and other inequitable conduct of defendant as set forth in the Tenth Count of the Complaint.

22. Plaintiff denies each and every allegation of paragraph 22 of the Counterclaim. Any statements, written or otherwise, by plaintiff with respect to its capability to institute and intention to institute additional quality control procedures, and its intention to apply or install tooling, machinery, training and testing procedures, and use personnel adequate to manufacture the items in a timely and workmanlike manner consistent with the high standards of the Naval nuclear program, resulted directly from and were dependent upon defendant's assurances, agreements, representations and warranties to plaintiff as set forth in paragraphs 13, 16(b), 16(c), 46-48, 64, 65 and 82 of the Complaint in this action, or were based upon the mutual mistake of the parties as set forth in the Ninth Count of the Complaint, or were based upon the mistake of plaintiff and the misrepresentations and other inequitable conduct of defendant as set forth in the Tenth Count of the Complaint.

23. Plaintiff denies each and every allegation of paragraph 23 of the Counterclaim.

24. Plaintiff denies each and every allegation of paragraph 24 of the Counterclaim.

25. Plaintiff denies each and every allegation of paragraph 25 of the Counterclaim.

26. Plaintiff denies each and every allegation of paragraph 26 of the Counterclaim.

COUNT IV

27. Plaintiff repeats and realleges its responses to paragraphs 1 through 12 and 21 through 26 of the Counterclaim as if set forth at length herein.

28. Plaintiff denies each and every allegation of paragraph 28 of the Counterclaim.

29. Plaintiff denies each and every allegation of paragraph 29 of the Counterclaim.

30. Plaintiff denies each and every allegation of paragraph 30 of the Counterclaim.

COUNT V

31. Plaintiff repeats and realleges its responses to paragraphs 1 through 30 of the Counterclaim as if set forth at length herein.

32. Plaintiff denies each and every allegation of paragraph 32 of the Counterclaim.

33. Plaintiff denies each and every allegation of paragraph 33 of the Counterclaim.

FIRST AFFIRMATIVE DEFENSE

Each Count of the Counterclaim fails to state a claim upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

Defendant has no standing to assert those claims of the Counterclaim seeking recovery on behalf or for the benefit of the United States.

THIRD AFFIRMATIVE DEFENSE

As to the claims of the Counterclaim brought by defendant on behalf of or for the ultimate benefit of the United States defendant is not the real party in interest.

Reply to Counterclaim

FOURTH AFFIRMATIVE DEFENSE

Defendant is estopped from asserting its Counterclaim by the doctrine of unclean hands, including defendant's fraud, misrepresentations, overreaching, and other inequitable conduct, as well as defendant's breaches of contract, warranty and covenant of good faith and fair dealing. Defendant is further estopped from asserting and/or has waived its rights with respect to the claims in the Counterclaim by permitting plaintiff to expend large amounts of time and money in continued performance of the work and acceptance of said performance.

FIFTH AFFIRMATIVE DEFENSE

Any delays in plaintiff's performance of the work called for by the purchase orders which are the subject of the Counterclaim were caused by defendant's fraud, misrepresentations, overreaching and other inequitable conduct, as well as defendant's breaches of contract, warranty and covenant of good faith and fair dealing. Defendant is also estopped and/or has waived any claims for delay by permitting plaintiff to expend large amounts of time and money in continued performance of the work and acceptance of said performance.

SIXTH AFFIRMATIVE DEFENSE

Any claims asserted in the Counterclaim based upon fraud are not stated with particularity and, accordingly, are fatally defective under Rule 9(b) of the Federal Rules of Civil Procedure.

SEVENTH AFFIRMATIVE DEFENSE

Reply to Counterclaim

In the event that and to the extent that the claims asserted in the Complaint are barred by the statute of limitations, the claims asserted in the Counterclaim are likewise barred.

EIGHTH AFFIRMATIVE DEFENSE

The claims asserted in the Counterclaim are barred by the doctrine of laches.

WHEREFORE, plaintiff, Curtiss-Wright Corporation, in addition to the demands set forth in its Complaint in this action, demands:

A. That the Counterclaim be dismissed with prejudice.

B. That costs and attorneys fees be awarded to plaintiff.

C. That the Court grant to plaintiff such other further and additional relief as may be just and proper.

CRUMMY, DEL DEO, DOLAN
& PURCELL
Attorneys for Plaintiff

s/ Ralph N. Del Deo
Ralph N. Del Deo

AMENDMENT TO AND SUPPLEMENTAL COMPLAINT, FILED NOVEMBER 18, 1976

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

(Judge Coolahan)
Civil Action No. 76-794

[TITLE OMITTED]

Plaintiff, for its Amendment To And Supplemental Complaint alleges as follows:

SEVENTEENTH COUNT

125. Plaintiff repeats and realleges all of the allegations contained in paragraphs 1 through 7 of the Complaint in this action as if set forth at length herein.

126. From on or about early in 1968 through 1972, on various occasions, plaintiff and defendant entered into a series of 21 contracts pursuant to which plaintiff entered into the business of manufacturing nuclear components and performing related work for the defendant, for the aggregate sum of Two Hundred Fourteen Million Six Hundred Thousand Dollars ($214,600,000.00), which defendant agreed to pay plaintiff.

127. To date, plaintiff has performed all of the terms and conditions of those contracts designated as Purchase Order Nos. B-382, B-384, B-410, B-412 and B-425 on its part to be performed.

128. The balance due on account of the price stipulated in said Purchase Orders, after crediting all progress payments made, is Three Million Six Hundred Seventy-Three Thousand Five Hundred Eighty-Four Dollars ($3,673,584.00) over and

above such unliquidated additional amounts as may be found to be due plaintiff thereon under the foregoing Counts of the Complaint in this action.

129. Defendant has not paid said sum of Three Million Six Hundred Seventy-Three Thousand Five Hundred Eighty-Four Dollars ($3,673,584.00) to plaintiff or any part thereof, although demand therefor has been made.

WHEREFORE, plaintiff demands judgment against defendant on this Count for the sum of $3,673,584.00, interest, and costs.

EIGHTEENTH COUNT

130. Plaintiff repeats and realleges all of the allegations contained in paragraphs 1 through 7 of the Complaint in this action as if set forth at length herein.

131. From on or about early in 1968 through 1972, on various occasions, plaintiff and defendant entered into a series of 21 contracts pursuant to which plaintiff entered into the business of manufacturing nuclear components and performing related work for the defendant, for the aggregate sum of Two Hundred Fourteen Million Six Hundred Thousand Dollars ($214,600.00) which defendant agreed to pay plaintiff.

132. To date, plaintiff has performed all the terms and conditions of those contracts designated as Purchase Order Nos. A-550, A-595, A-642, B-423, B-429, B-433 and B-442 on its part to be performed.

133. The balance due on account of the price stipulated in said Purchase Orders, after crediting all progress payments made, if Four Million Seven Hundred Four Thousand Nine

Hundred Fifty Two Dollars ($4,704,952.00) over and above such unliquidated additional amounts as may be found to be due plaintiff thereon under the foregoing Counts of the Complaint in this action.

134. Defendant has not paid said sum of Four Million Seven Hundred Four Thousand Nine Hundred Fifty Two Dollars ($4,704,952.00) to plaintiff or any part thereof although demand therefor has been made.

WHEREFORE, plaintiff demands judgment against defendant on this Count for the sum of $4,704,952.00, interest, and costs.

CRUMMY, DEL DEO, DOLAN & PURCELL
Attorneys for Plaintiff

s/ Ralph N. Del Deo
Ralph N. Del Deo

ANSWER TO AMENDMENT TO AND SUPPLEMENTAL COMPLAINT AND COUNTERCLAIM, FILED DECEMBER 8, 1976

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 76-794

[TITLE OMITTED]

ANSWER TO AMENDMENT TO AND SUPPLEMENTAL COMPLAINT; AND COUNTERCLAIM OF DEFENDANT GENERAL ELECTRIC COMPANY

Defendant General Electric Company Answers the Amendment to and Supplemental Complaint of Plaintiff Curtiss-Wright Corporation, as follows:

1-124. Defendant admits and denies the allegations of Paragraphs 1 through 124, inclusive, of Plaintiff's Complaint in the manner set forth in Paragraphs 1 through 124, inclusive, of Defendant's Answer.

SEVENTEENTH COUNT

125. Defendant admits and denies the allegations of Paragraph 125 of the Complaint in the manner set forth in Paragraphs 1 through 7, inclusive, of this Answer.

126. Defendant admits that, during the period specified, Plaintiff and Defendant entered into 21 contracts relating to the manufacture and sale of certain nuclear components for the Navy Nuclear Program. Defendant avers that, although the aggregate price of said contracts, which were designated as purchase orders, is approximately as alleged in the Complaint, in view of change orders and other adjustments the exact total is subject to qualification and interpretation. Defendant denies the remaining allegations of Paragraph 126.

127. Defendant admits that Plaintiff has delivered the hardware required by the contracts. Defendant denies the remaining allegations of Paragraph 127.

128. Defendant admits that $3,673,584.00 is the amount representing the redeterminable price, less progress and liquidation payments, under the listed purchase orders. Defendant denies that that amount is a "balance due" to which Plaintiff is entitled. Defendant denies the remaining allegations of Paragraph 128.

129. Admitted.

EIGHTEENTH COUNT

130. Defendant admits and denies the allegations of Paragraph 130 of the Complaint in the manner set forth in Paragraphs 1 through 7, inclusive, of this Answer.

131. Defendant admits that, during the period specified, Plaintiff and Defendant entered into 21 contracts relating to the manufacture and sale of certain nuclear components for the Navy Nuclear Program. Defendant avers that, although the aggregate price of said contracts, which were designated as purchase orders, is approximately as alleged in the Complaint, in view of change orders and other adjustments the exact total is subject to qualification and interpretation. Defendant denies the remaining allegations of Paragraph 131.

132. Defendant admits that Plaintiff has delivered the hardware required by the contracts. Defendant denies the remaining allegations of Paragraph 132.

133. Denied.

134. Admitted.

DEFENSES

Defendant reasserts and incorporates by reference herein its First through Seventeenth Defenses, inclusive, set forth in Defendant's Answer.

EIGHTEENTH DEFENSE

Plaintiff's claim for final payments under Counts 17 and 18 of the Amendment to and Supplemental Complaint are barred by its anticipatory breach of, failure to meet the condition precedent in, and refusal to abide by, Paragraph 5c. of the Terms and Conditions of Purchase applicable to each of the purchase orders.

NINETEENTH DEFENSE

Plaintiff's claims for final payments under Counts 17 and 18 of the Amendment to and Supplemental Complaint are barred by its refusal to enter into an unconditional amendment for redetermination to the purchase orders as required by each of the purchase orders.

WHEREFORE, Defendant General Electric Company demands that the Complaint and the Amendment to and Supplemental Complaint be dismissed with prejudice; that costs and its attorneys' fees be awarded to Defendant; and that the Court grant to Defendant such other, further and additional relief as may be just and proper.

COUNTERCLAIM

1-33. Defendant repeats and realleges the allegations of Paragraphs 1-33, inclusive, of its Counterclaim as if fully set forth herein.

WHEREFORE, Defendant demands as relief from Plaintiff the following damages:

1. The damages and additional costs incurred as a result of the action and inactions of Plaintiff complained of in this Counterclaim.

2. The value of the benefits and avoidance of losses conferred upon Plaintiff through Defendant's efforts alleged in Paragraph 32 and 33 of this Counterclaim.

3. Defendant's costs, disbursements and attorneys' fees of this litigation.

4. Such other, further and additional relief as to this Court may seem just and proper.

COLE AND GRONER, P.C.

s/ Alan Y. Cole
ALAN Y. COLE
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Of Counsel:

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ADDITIONAL REPLY TO COUNTERCLAIM, FILED DECEMBER 27, 1976

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

(Judge Coolahan)
Civil Action
No. 76-794

[TITLE OMITTED]

Whereas defendant, General Electric Company, has repeated and realleged the allegations of Paragraphs 1-33, inclusive, of its Counterclaim in response to the Amendment To And Supplemental Complaint in this action, plaintiff, Curtiss-Wright Corporation, herein replies to said paragraphs as follows:

1-33. Plaintiff repeats and realleges its responses to paragraphs 1-33 of the Counterclaim as if set forth at length herein.

AFFIRMATIVE DEFENSES

Plaintiff reasserts its First through Eighth Affirmative Defenses to the Counterclaim as if set forth at length herein.

WHEREFORE, plaintiff, Curtiss-Wright Corporation, in addition to the demands set forth in the Amendment To And Supplemental Complaint in this action, demands:

A. That the Counterclaim be dismissed with prejudice.

B. That costs and attorneys fees be awarded to plaintiff.

Additional Reply to Counterclaim

C. That the Court grant to plaintiff such other further and additional relief as may be just and proper.

CRUMMY, DEL DEO, DOLAN
& PURCELL

s/ Ralph N. Del Deo
Ralph N. Del Deo

AFFIDAVIT OF JAMES H. SULLIVAN, FILED MAY 3, 1977, WITH ATTACHMENTS

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 76-794

[TITLE OMITTED]

STATE OF NEW JERSEY :
: SS.:
COUNTY OF BERGEN :

JAMES H. SULLIVAN, being duly sworn according to law, upon his oath, does depose and say:

1. Since April of 1973, I have been employed as Director of Administration — Nuclear Facility by Curtiss-Wright Corporation, plaintiff in the above captioned matter (hereinafter "Curtiss-Wright"), and I am personally familiar with the matters set forth herein.

2. The records of Curtiss-Wright reflect that between May 1, 1968 and September 30, 1970, Curtiss-Wright entered into 21 subcontracts with General Electric Company, defendant, in the above captioned matter (hereinafter "General Electric"), pursuant to which Curtiss-Wright agreed to supply a total of 167 large components for use in nuclear propulsion systems of naval vessels. These 21 contracts are designated as Purchase Orders Nos. A-550, A-595, A-641, A-642, A-656, A-661, B-382, B-423, B-428, B-412, B-433, B-442, B-384, B-425, B-429, B-410, A-675, A-113, B-451, B-452, and B-478 (hereinafter "the 21 Purchase Orders"). Each Purchase Order is subject to the "Terms and Conditions of Purchase", attached hereto as EXHIBIT "D".

3. Curtiss-Wright has made delivery of each of the large components called for by the 12 subcontracts designated as Purchase Orders Nos. A-642, B-412, B-384, B-382, B-423, B-433, A-550, B-425, B-410, B-442, B-595 and B-429 (hereinafter "the 12 Purchase Orders").

4. On October 17, 1975, Curtiss-Wright submitted to General Electric the final invoices for Purchase Order Nos. B-382, B-384, B-412 and B-425, and on November 3, 1975, Curtiss-Wright submitted its final invoice for Purchase Order No. B-410. Each of these invoices was accompanied by a cover letter, a sample of which is attached to this Affidavit as EXHIBIT "B".

5. On December 29, 1975, General Electric returned said invoices to Curtiss-Wright without payment.

6. Subsequently Curtiss-Wright submitted to General Electric the final invoices for Purchase Order Nos. A-642, B-423, B-433, A-550, B-442, A-595 and B-429, and resubmitted the invoices for those Purchase Orders designated in Paragraph 4, *supra*. Each of these invoices was accompanied by a qualified release, a sample of which has been attached to this Affidavit as EXHIBIT "C".

7. As of this date, General Electric has failed to pay each of said invoices.

8. Pursuant to the Terms and Conditions, Paragraph 19, Curtiss-Wright prior to submitting its final invoices on the 12 the Defense Contract Auditing Agency of the United States Department of Defense (hereinafter "DCAA"), which has issued audit reports verifying Curtiss-Wright's cost data in each instance. Based on its audits the DCAA recommended no downward revision of the prices set forth in the 12 Purchase Orders as amended.

9. As to the 5 Purchase Orders designated in Paragraph 4 *supra*, General Electric's acceptance of the DCAA's recommendation of no downward adjustment in the prices set forth in the Purchase Orders as amended was evidenced by General Electric's forwarding of "Final Price Redetermination Amendments" to Curtiss-Wright.

10. As to the 7 Purchase Orders designated in Paragraph 6 *supra*, General Electric as of this date has not forwarded "Final Price Redetermination Amendments". In a written communication to Curtiss-Wright dated February 23, 1976, General Electric took the position that it would not forward these amendments due to the dispute between the parties as to Curtiss-Wright's position that it could submit qualified releases at the time of final invoicing. General Electric did not, however, indicate any disagreement with the DCAA recommendations described in Paragraph 8 *supra*.

11. Attached to this Affidavit as EXHIBIT "A" — Schedule of Liquidated Claims, is a chart which reflects, as to each of the 12 Purchase Orders, (a) a description of the components involved, (b) the date of the original Purchase Order, (c) the date delivery of the large components was completed, (d) the date Curtiss-Wright's final cost data was submitted, (e) the date the DCAA audit was issued, (f) the date the final invoices were submitted and, where applicable, returned and re-submitted, and (g) the total value of the final invoices (hereinafter "the holdbacks").

12. The total amount of holdbacks on the 12 Purchase Orders is $8,378,536.00 exclusive of interest, constituting approximately 10 percent of the total contract prices of the 12 Purchase Orders as amended. On eight of the remaining nine of the 21 Purchase Orders, Plaintiff has completed delivery of the large components called for thereunder. The amount of the holdbacks on these eight Purchase Orders is $9,173,464.00.

13. General Electric's failure to make payment on the invoices listed in Exhibit "A" attached hereto has been the subject of correspondence and discussion between the parties wherein General Electric stated the reasons for its refusal to pay the invoices. The correspondence and discussions dealt solely with Curtiss-Wright's desire to preserve certain claims at the time of final invoicing and General Electric's objection to this position. At no time did General Electric indicate that the amounts of the final invoices were incorrect.

14. To the best of my knowledge, the records of Curtiss-Wright do not reflect nor am I personally aware that, prior to the inception of Civil Action No. 76-794, General Electric or the United States informed Curtiss-Wright that Curtiss-Wright had defaulted on or was in breach of any one of the 21 Purchase Orders which had resulted in outstanding damages to General Electric or the United States. Nor did General Electric or the United States, prior to the inception of Civil Action No. 76-794, ever indicate to Curtiss-Wright any intention to withhold final payment under the 21 Purchase Orders as set-off for damages allegedly suffered by either or both of them.

15. The records of Curtiss-Wright further reflect that on July 2, 1976, for purpose of avoiding further dispute at that time between the parties regarding General Electric's insistence upon Curtiss-Wright's executing unqualified releases, and to permit payment to be made to Curtiss-Wright without prejudice to the position of either party, Curtiss-Wright offered in exchange for payment of the holdbacks, to post a surety payment bond in the amount of the holdbacks, conditioned on the repayment of the holdbacks upon General Electric's demand. As of this date General Electric has failed to substantively respond to this proposal.

Affidavit of James H. Sullivan

s/ James H. Sullivan
JAMES H. SULLIVAN

Sworn to May 2nd, 1977

Affidavit of James H. Sullivan

EXHIBIT "A" — SCHEDULE OF LIQUIDATED CLAIMS

Contract No.	Description	Original P.O. Date	Date Hardware Delivery Completed	Date Final Cost Data Submitted	Date DCAA Audit Issued	INVOICE DATA			$ Value of Holdback Excluding Interest
						Submitted	Returned	Resubmitted	
A642	(1) S6G Vessel, Head, Shield	6/2/69	11/16/73	3/27/75	5/15/75	5/18/76	-	-	$480489
B412	(2) S6G Pressurizers	4/3/69	12/26/73	4/15/75	5/16/75	10/17/75	12/29/75	5/18/76	406208
B384	(12) D2G Steam Generators	12/31/68	1/30/74	3/27/75	5/16/75	10/17/75	12/29/75	5/18/76	1201106
B382	(4) D2G Pressurizers	1/7/69	4/23/74	4/15/75	5/16/75	10/17/75	12/29/75	5/18/76	381582
B423	(1) D2G Pressurizer	9/22/69	5/6/74	5/29/75	6/30/75	5/18/76	-	-	87290
B433	(4) S6G Pressurizers	5/8/70	9/30/74	5/13/75	6/6/75	5/18/76	-	-	480663
A550	(4) D2G Vessels, Heads, Shields	5/1/68	11/23/74	11/13/75	12/18/75	5/18/76	-	-	1475197
B425	(4) D2G Steam Generators	9/15/69	11/20/74	4/1/75	5/15/75	10/17/75	12/29/75	5/18/76	369472
B410	(4) S6G Steam Generators	10/22/69	12/20/74	7/8/75	8/4/75	11/3/75	12/29/75	5/18/76	1315216
442	(3) S6G Pressurizers	9/30/70	3/24/75	11/17/75	1/13/76	5/18/76	-	-	422021
A595	(2) D2G Vessels, Heads, Shields	7/26/68	12/22/76	7/9/76	8/13/76	9/23/76	-	-	263747
B429	(18) D2G Steam Generators	3/10/70	3/31/76	5/24/76	7/27/76	8/30/76	-	-	1495545
									8378536

Affidavit of James H. Sullivan

EXHIBIT B

cc: Sullivan, Lovell, Ahl, Jaugstetter, Janiec

October 14, 1975

General Electric Company
Machinery Apparatus Operation
P.O. Box 1021
Schenectady, New York 12301

Attention: Mr. F.J. Balicki

C-WC Ref. No. A-105-35

Subject: Proposed Amendment No. 49 to MAO P.O. B-382

Gentlemen:

The enclosed amendment is executed and delivered by Seller on the express condition that:

Notwithstanding any provision of this order to the contrary, Seller reserves all rights arising out of the loss of $29,300,000 on this and other orders which is the subject of a Request for Extracontractual Relief under P.L. 85-804 filed with the Department of the Navy.

Please confirm in writing, at the time you execute the original of this amendment and return it to us, that you understand that it is executed and delivered on the above stated condition.

Very truly yours,

CURTISS-WRIGHT CORPORATION

Y.A. Wokovits
Manager, Contracts & Proposals

FAW:am
Enclosure

Affidavit of James H. Sullivan

EXHIBIT C

CURTISS-WRIGHT CORPORATION

Wood-Ridge, New Jersey 07075

General Electric Company
Machinery Apparatus Operation
Post Office Box 1021
Schenectady, New York 12301

Attention: Mr. E. Phelps

Subject: GE/MAO — C-WC Contracts — Final Payment

Dear Mr. Phelps:

Pursuant to the terms of Purchase Order No. A-595 and in consideration of the sum of two hundred sixty-three thousand seven hundred forty seven dollars ($263,747) which has been or is to be paid under the said Purchase Order to Curtiss-Wright Corporation, One Passaic Street, Wood-Ridge, New Jersey, Curtiss-Wright Corporation, upon payment of the said sum by General Electric Company, does remise, release and discharge General Electric Company and the Government, their officers, agents and employees, of and from all liabilities, obligations, claims and demands whatsoever under or arising from the said Purchase Order, except such claims as are set forth in a certain civil action entitled Curtiss-Wright Corporation, Plaintiff, versus General Electric Company, Defendant, File No. 76-794 pending in the United States District Court for the District of New Jersey.

IN WITNESS WHEREOF, this Release has been executed this twenty-third day of September, 1976.

CURTISS-WRIGHT CORPORATION

By: Richard P. Sprigle
Senior Vice President

CERTIFICATE

I, Francis E. Fallon certify that I am the Secretary of Curtiss-Wright Corporation named in the foregoing Release; that Richard P. Sprigle who signed said Release on behalf of Curtiss-Wright Corporation, is the Senior Vice President of said Corporation, that said Release was duly signed for and in behalf of said Corporation by authority of its governing body and is within the scope of its corporate powers.

s/ Francis E. Fallon
Francis E. Fallon

(Corporate Seal)

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Attachment
1. Certificate of Current Cost or Pricing Data

This Purchase Order is placed by the General Electric Company ("General Electric") pursuant to the prime contract ("Prime Contract"), indicated on the attached Purchase Order, between General Electric, acting through the Machinery Apparatus Operation (MAO), and the U.S. Government ("Government" including, but not limited to, the "Navy"), acting through the Department of the Navy, Naval Ship Systems Command ("Navy"). This order does not bind nor purport to bind the United States Government, its officers, employees or agents.

1. DEFINITIONS — As used throughout these terms and conditions, the following definitions shall apply:

Government — the United States of America

Commission — the United States Atomic Energy Commission or its duly authorized representatives

Navy — the Department of the Navy or its duly authorized representatives

Cognizant Government Agency — shall mean the United States Navy

Buyer — shall mean Machinery Apparatus Operation of the General Electric Company

Seller — the legal entity which has agreed to provide the goods or services required by this order

Purchase Order — the contract document in which, and by acknowledgement thereof, Seller agrees to provide, for consideration stated therein, the goods and services in accordance with the requirements contained or referenced therein. The terms "order," "contract," or "subcontract" shall be synonymous with the term "purchase order."

Change Order — a unilateral direction by the Buyer to the Seller to proceed with the work as changed and to report the effect on the order pursuant to the provisions of Article 6 entitled, "Changes, Extras and Substitutions."

Amendment — the contract document in which, and by acknowledgement thereof, the Seller agrees to modify the order in accord with the provisions of the amendment.

Lower-tier Subcontractor — a supplier or subcontractor, including any supporting lower-tier supplier or subcontractor, who has a subcontract or order from the Seller or any lower-tier subcontractor.

2. CONTRACT RIGHTS — This order (which term shall be deemed to include related plans, drawings, specifications, and other documents) contains the entire agreement of the parties, and no modification, alteration, waiver, or other provision which is inconsistent with or in addition to the provisions of this order shall have any force or effect unless the same shall be incorporated in the order in writing by the Buyer. Failure of Buyer to enforce any of its rights hereunder shall not constitute a waiver of such rights or of any other rights under this order.

3. DELIVERY — All Delivery requirements set forth in this order are firm. Seller agrees that delays during performance of the order which would cause delivery to extend beyond contractual delivery date(s), and which are the responsibility of Seller, must be made up by Seller at his expense through the use of whatever means are necessary including, but not limited to, overtime and additional workshifts.

Unless otherwise provided in this order, delivery shall not be made more than 45 days prior to the delivery dates specified herein. Buyer may return early deliveries at Seller's risk and expense. Seller shall comply with the delivery schedule provided in this order but shall not make material or production commitments without specific written authorization by Buyer nor in advance of such time as Seller reasonably believes necessary to meet delivery schedules except as otherwise specified in the order.

4. TAXES — Unless otherwise expressly stated on the face of this order, the price stated herein includes all applicable Federal,

State and Local taxes in effect on the date of this order but does not include any State or local sales, use or any other tax directly applicable to the completed supplies or services covered by this order from which Seller or this transaction is exempt.

5. PAYMENTS —

a. Except as otherwise provided in this order, e.g., progress payments, no payment by Buyer shall be due until thirty (30) days after (1) receipt of an acceptable invoice and appropriate evidence that Seller has met all the requirements of the order, or (2) receipt of the supplies at destination, whichever last occurs. Buyer may at his discretion make payments for partial delivery of supplies if so requested by Seller. No payment made by Buyer shall be deemed to indicate final acceptance and any payment made prior to final acceptance shall be returned by Seller at the request of Buyer if the supplies to which the payment relates are rejected.

b. Unless otherwise provided, if this order provides a discount for prompt payment, the discount period shall be calculated from the date an acceptable invoice and supporting evidence that all order requirements have been met is received or the date of receipt at destination of the supplies, whichever last occurs.

c. Seller and each assignee under an assignment in effect at the time of final payment agree as a condition precedent to final payment, that the Buyer and the Government, their respective officers, agents and employees are released from all liabilities, obligations and claims arising under or by virtue of this order. Seller further agrees that the final invoice shall constitute not less than ten percent (10%) of the total order price.

6. CHANGES, EXTRAS AND SUBSTITUTIONS —

a. Buyer may at any time, by a written Change Order issued by Buyer and without notice to the sureties, make changes, within the general scope of this order, in any one or more of the following:

1) Drawings, designs or specifications, where the supplies to be furnished are to be specifically manufactured for Buyer in accordance therewith;

2) Method of shipment or packing;

3) Place of delivery, inspection or acceptance;

4) The amount of Government furnished property;

5) The quantities or items of any repair parts lists.

If any such Change Order causes an increase or decrease in the cost of, or the time required for, performance of any part of the work under this order, or otherwise affects any other provision of this order, whether changed or not changed by any such written notice of change, an equitable adjustment shall be negotiated in the order price or delivery requirements, or both, and in such other provisions of the order as may be affected. Such adjustment shall be accomplished by a written amendment to this order signed by Buyer. No changes to this order are authorized unless made by Buyer representative designated by name herein and substantiated by a formal written amendment/change order. Changes made by Seller, unless authorized by a written amendment/change order, shall be made at the sole risk of Seller, there being no financial recourse against Buyer.

b. Any claim by Seller for adjustment under this article must be asserted within 30 days or such earlier date as may be specified by Buyer from the date of receipt by Seller of the notification of Change Orders; provided, however, that Buyer, if he decides that the facts justify such action, may receive and act upon any such claim asserted at any time prior to final payment under this order.

c. Where the cost of property made obsolete or excess as a result of a change is included in Seller's claim for adjustment. Buyer reserves the right to prescribe the manner of disposition of such property.

d. Nothing in this article shall excuse Seller from proceeding with the order as changed.

e. Buyer will not pay for additional work or extras unless such work or extras have been ordered in writing and the price therefor agreed upon. Changes made by Seller without an authorized Change Order or Amendment shall be made at the sole risk of Seller, there being no financial recourse against Buyer.

f. Seller shall not substitute other materials or accessories for those specified in the order without the written consent of Buyer.

7. LIENS — Seller agrees to delivery to Buyer the articles covered by this order free and clear of all liens, claims, and encumbrances.

8. INSPECTION —

a. All work (which term throughout this article includes without limitation raw materials, procedures and processes,

components, intermediate assemblies and end products) shall be subject to inspection and test by Buyer and the Government, to the extent practicable at all times and places including the period of manufacture, and in any event prior to acceptance. Seller is responsible for, and shall upon Buyer's request furnish evidence of, compliance with all requirements of the order; and inspection and test by Buyer or the Government of any work or approval of designs, drawings, samples, test results, procedures, processes or schedules by Buyer or the Government does not relieve Seller from any responsibility to meet the order requirements.

b. In case any work is defective in material or workmanship or otherwise not in conformity with the requirements of this order, Buyer shall have the right either to reject it (with or without instructions as to its disposition) or to require correction. Work which has been rejected or required to be corrected shall be removed, or, if permitted or required by Buyer, corrected in place by and at the expense of Seller promptly after notice, and shall not thereafter be tendered for acceptance unless the former rejection or requirement of correction is disclosed. If Seller fails promptly to remove such work which is required to be removed or promptly to replace or correct such work as specified by Buyer, Buyer either (1) may by contract or otherwise replace or correct such work and charge to Seller the cost occasioned Buyer thereby, or (2) may terminate this order for default as provided in the article of this order entitled "Default." Unless Seller corrects or replaces such work within the delivery schedule, Buyer may require the delivery of such work at a reduction in price which is equitable under the circumstances.

c. If any inspection or test is made by Buyer and/or the Government on the premises of Seller or a lower-tier subcontractor, Seller without additional charge shall provide all reasonable facilities and assistance for the safety and convenience of Buyer and/or the Government's representatives in the performance of their duties. If Buyer and/or Government inspection or test is made at a point other than the premises of Seller or a lower-tier subcontractor, it shall be at the expense of Buyer except as otherwise provided in this order; provided that, in case of rejection, Buyer shall not be liable for any reduction in value of samples used in connection with such inspection or test.

d. All inspections and tests by Buyer and/or the Government shall be performed in such a manner as not to unduly delay the work. Buyer reserves the right to charge to Seller any additional costs of Buyer's and/or the Government's inspection and test when work is not ready at the time such inspection and test is requested by Seller or when reinspection or retest is necessitated by prior rejection.

e. Acceptance or rejection of the work shall be made as promptly as practicable after delivery, except as otherwise provided in this order; but failure to inspect and accept or reject work shall neither relieve Seller from responsibility for such work as is not in accordance with the order requirements nor impose liability upon Buyer therefor. Except as otherwise provided in this order, acceptance shall be conclusive except as regards latent defects, fraud, or such gross mistakes as amount to fraud.

f. Inspection and test requirements specifically required by this order are for the convenience of Buyer and/or the Government and do not relieve Seller of his responsibility to provide a high-quality product which meets order requirements.

If during the period specified in the article of this order entitled "Warranty" any failure to meet order requirements is uncovered (including any uncovered by Buyer's and/or the Government's own tests), Seller shall be responsible in accordance with the provisions of said warranty article for correcting the condition; this requirement applies regardless of the extent of testing or inspection specifically required by this order.

g. Seller shall provide and maintain and require its lower-tier subcontractors to provide and maintain an inspection and quality control system acceptable to Buyer covering the work hereunder. Records of all inspection and quality control work by Seller and its lower-tier subcontractors shall be kept complete and available to Buyer and/or the Government during performance of this order and for such longer period as may be specified elsewhere in this order.

9. WARRANTY —

a. In addition to its obligations under other provisions of this order (including those concerning inspection and acceptance), Seller warrants material and workmanship, and that the items furnished under this order will be manufactured in accordance with the order requirements, and, if Seller is responsible for design, will meet all design requirements set forth in this order. The term of this warranty is for a period of three years after delivery or for a period of one year after the date first placed in use, whichever first expires (or in the case of standard commercial articles, one year *after delivery*).

b. Buyer shall give Seller notice of any defect or lack of conformity with order requirements within a reasonable time after discovery. Seller shall promptly thereafter (without cost to Buyer) either correct or replace such defective or non-conforming item or component thereof, and correct or replace

all appropriate drawings, procedures and manuals, or, if Buyer does not require correction or replacement of the defective or non-conforming item or component thereof, Seller, within a reasonable time after the notice shall repay such portion of the order price of the item as is equitable under the circumstances. If Seller fails to proceed with reasonable promptness to make any correction or replacement in accordance with the provisions of this article, Buyer reserves the right to cause such correction or replacement to be made and Seller agrees to reimburse Buyer for the costs incurred thereby. Unless otherwise agreed, correction or replacement of defective or non-conforming items or components thereof shall be performed subject to and in accordance with the provisions of this order. Buyer has the right to require Seller to correct in place any defective or non-conforming item or component thereof delivered under this order or to return such item or component to Seller for correction in which case Seller shall be responsible for packing and packaging charges and shipping cost (to and from Seller's plant) for item or component returned for correction. In exercising this right, Buyer will notify Seller which alternative it proposes to take. In this connection, Buyer will be reasonable in making its election in terms of its and the Government's time requirements, the relative economics of each course and the particular circumstances at the time of election, giving due regard to any reasonable requests of Seller. In the event that Seller is required to correct in place, Seller shall not be responsible for removal or reinstallation of the items or structural parts not furnished by Seller under this order. Seller shall not be required to incur costs for such correction in place in excess of an amount equal to the total price of this order. In the event that any defective item is returned by Buyer to Seller's plant for correction, Buyer shall be responsible for removing the defective item from the system and Seller shall upon completion of correction, make delivery as directed by Buyer, but shall not be obligated to incur costs in excess of the total price of this

order, plus shipping (to and from Seller's plant) and packing and packaging charges, nor shall Seller be responsible for any costs of reinstallation. However, Seller shall not be responsible for shipping costs outside the continental limits of the United States.

c. The warranty with respect to a corrected or replaced item, items or components thereof, shall be subject to the same terms as the warranty provided for in paragraph a. The original warranty for other than the corrected or replaced item, items, or components thereof shall continue until the expiration of the period prescribed in paragraph a. plus a period equal to the time elapsed between the discovery of the defect and correction or replacement of the defective item, items or components thereof.

d. Defective or non-conforming items or components thereof which Seller is required to correct or replace in accordance with the provisions of this article may be contaminated with radioactivity. Should the level of radioactivity of items or components thereof be sufficient to create by itself a "radiation area" as defined in 10 C.F.R. Sec. 20.202 in effect on the date of this order, Seller shall nevertheless promptly correct or replace such items or components as directed by Buyer. In the event Seller's costs of correction or replacement are increased solely by reason of the level of radioactivity of any such items or components thereof which exceeds the level specified in the definition of "radiation area," an equitable adjustment shall be made, and such adjustment shall be agreed to in writing. If Buyer, with respect to any such items or components thereof having a level of radioactivity sufficient to create by itself a "radiation area," elects, as provided in paragraph b. above to require payment of an equitable portion of the order price, the parties shall not consider the estimated additional costs of correcting such items or component incurred solely by reason of the level of radioactivity specified in the definition of "radiation area."

e. Approval of design, drawings, samples, test results, procedures, processes or schedules by Buyer or the Government shall not in any way limit or diminish Seller's warranties hereunder.

10. RIGHTS IN TECHNICAL DATA —

a. Definitions.

1) Technical Data, as used in this clause, means technical writing, sound recordings, pictorial reproductions, drawings, or other graphic representations and works of a technical nature, whether or not copyrighted, which are specified to be delivered pursuant to this order. The term does not include financial reports, cost analyses, and other information incidental to order administration.

2) Limited Rights means rights to use, duplicate, and disclose technical data in whole or in part, by or for the Government, with the express limitation that such data may not be released outside the Government, used, duplicated, or disclosed in whole or in part, for manufacture or procurement, except for:

(i) emergency repair or overhaul work by or for the Government where the item or process concerned is not otherwise reasonably available to enable timely performance of the work; and

(ii) release to a foreign government as the interests of the United States may require;

provided, in either case, that the release of such data shall be subject to the limitations of this paragraph 2).

3) Unlimited Rights means rights to use, duplicate or disclose technical data, in whole or in part, in any manner and for any purpose whatsoever, and to have or permit others to do so.

b. Government Rights.

1) The Government shall have unlimited rights in:

(i) technical data resulting directly from performance of experimental, developmental or research work which was specified as an element of performance in this or any other Government contract or subcontract;

(ii) technical data necessary to enable manufacture of end-items, components and modifications, or to enable the performance of processes, when the end-items, components, modifications or processes have been, or are being, developed under this or any other Government contract or subcontract in which experimental, developmental or research work is, or was specified as an element of contract performance, except technical data pertaining to items, components or processes developed at private expense (but see 2) (ii) below):

(iii) technical data constituting corrections or changes to Government-furnished data;

(iv) technical data pertaining to end-items, components or processes which was prepared for the purpose of identifying sources, size, configuration, mating and attachment

characteristics, functional characteristics and performance requirements ("form, fit and function" data, e.g., specification control drawings, catalog sheets, envelope drawings, etc.)

(v) manuals or instructional materials prepared for installation, operation, maintenance or training purposes;

(vi) other technical data which has been, or is normally furnished without restriction by the Seller or subcontractor; and

(vii) technical data listed or described in an agreement incorporated into the Schedule of this contract, which the parties have predetermined on the basis of subparagraphs (i) through (vi) above, and agreed will be furnished with unlimited rights.

2) The Government shall have limited rights in:

(i) technical data, listed or described in an agreement incorporated into the Schedule of this order, which the parties have agreed will be furnished with limited rights; and

(ii) technical data pertaining to items, components or processes developed at private expense, other than such data as may be included in the data referred to in b) 1)(i), (iii), (iv), (v). and (vi);

provided that each piece of data to which limited rights are to be asserted pursuant to 2)(i) and (ii) above is marked with the following legend in which is inserted the number of the prime contract under which

the technical data is to be delivered and the name of the Seller or subcontractor by whom the technical data was generated:

"Furnished under United States Government Contract No. ____ Shall not be either released outside the Government, or used, duplicated, or disclosed in whole or in part for manufacture or procurement, without the written permission of ____, except for: (i) emergency repair or overhaul work by or for the Government, where the item or process concerned is not otherwise reasonably available to enable timely performance of the work; or (ii) release to a foreign government, as the interests of the United States may require; provided that in either case the release, use duplication or disclosure hereof shall be subject to the foregoing limitations. This legend shall be marked on any reproduction hereof in whole or in part."

No legend shall be marked on, nor shall any limitation on rights of use be asserted as to, any data which the Seller has previously delivered to the Government without restriction. The limited rights provided for by this paragraph (b)(2) shall not impair the right of the Government to use similar or identical data acquired from other sources.

c. Material Covered by Copyright.

1) Notwithstanding the provisions of b. above, Seller agrees to and does hereby grant to the Government, and to its officers, agents, and employees acting within the scope of their official duties, a royalty-free, nonexclusive and irrevocable license throughout the world for Government purposes to publish, translate,

reproduce, deliver, perform, dispose of, and to authorize others so to do, all technical data now or hereafter covered by copyright.

2) No such copyrighted matter shall be included in technical data furnished hereunder without the written permission of the copyright owner for the Government to use such copyrighted matter in the manner described above.

3) Seller shall report to Buyer and the Government promptly and in reasonable written detail each notice or claim of copyright infringement received by Seller with respect to any technical data delivered hereunder.

d. Removal of Unauthorized Markings.

Notwithstanding any provisions of this order concerning inspection and acceptance, the Government may modify, remove, obliterate, or ignore any marking not authorized by the terms of this order on any technical data furnished hereunder, if

(i) Seller fails to respond within sixty (60) days to a written inquiry by the Government concerning the propriety of the use of the marking, or

(ii) Seller's response fails to substantiate his contention that the use of the marking is authorized, in which case the Government shall give written notice to Seller.

e. Relation to Patents.

Nothing contained in this clause shall imply a license to the Government under any patent or be construed as affecting the

scope of any license or other right otherwise granted to the Government under any patent.

f. Limitation on Charges for Data.

Seller recognizes that the Government, or a foreign government with funds derived through the Military Assistance Program or otherwise through the United States Government, may contract for property or services with respect to which the vendor may be liable to Seller for charges for the use of technical data on account of such an order. Seller further recognizes that it is the policy of the Government not to pay in connection with its contracts, or to allow to be paid in connection with contracts made with funds derived through the Military Assistance Program or otherwise through the United States Government, charges for data which the Government has a right to use and disclose to others, which is in the public domain, or which the Government has been given without restrictions upon its use and disclosure to others. This policy does not apply to reasonable reproduction, handling, mailing, and similar administrative costs incident to the furnishing of such data. In recognition of this policy, Seller agrees to participate in and make appropriate arrangements for the exclusion of such charges from such orders, or for the refund of amounts received by Seller with respect to any such charges not so excluded.

g. Acquisition of Data from Subcontractors.

1) Whenever any technical data is to be obtained from a subcontractor under this order, Seller shall use this same clause in the order without alteration, and no other clause shall be used to enlarge or diminish the Government's or the Seller's rights in that subcontractor data which is required for the Government.

2) Technical data required to be delivered by a subcontractor shall normally be delivered to the next higher-tier subcontractor.

3) Seller and subcontractor will not use their power to award lower-tier subcontracts as economic leverage to acquire rights in data from their lower-tier subcontractors for themselves.

h. Notice of Certain Limited Rights.

Seller will promptly notify Buyer in writing of the intended use in the performance of the order of any end-item, component, modification or process for which the Seller intends to furnish data with limited rights; provided, that no such notice is required with respect to standard commercial items which are manufactured by more than one source of supply or with respect to data which the parties have specified in the Schedule would be furnished with limited rights. Subcontractors will notify the next higher-tier subcontractor.

i. Data — Withholding of Payment.

If "Technical Data" (as defined in 10 a.(1) above), or any part thereof, is not delivered within the time specified by this order or is deficient upon delivery (including having restrictive markings not specifically authorized by this order), Buyer may, until such data is delivered or deficiencies are corrected, withhold payment to Seller of ten percent (10%) of the order price unless a lesser withholding is specified in the Schedule. Payments shall not be withheld nor any other action taken pursuant to this clause where Seller's failure to make timely delivery or to deliver such data without deficiencies arises out of causes beyond the control and without the fault or negligence of Seller within the meaning of the clause hereof entitled "Default."

The withholding of any amount of subsequent payment thereof to Seller shall not be construed as a waiver of any rights accruing to the Government under this order.

j. Deferred Ordering of Technical Data.

The Government shall have the right to order, at any time during the performance of this order, or within two (2) years from either acceptance of all items (other than data) to be delivered under this order or termination of this order, whichever is later, any data called for in the Schedule of this order, and Seller shall promptly prepare and deliver such data as is ordered. However, Seller shall be relieved of the obligation to furnish data pertaining to an item obtained from a subcontractor upon the expiration of two (2) years from the date he accepts the item. When the data is delivered, payment shall be made, by equitable adjustment or otherwise, for converting the data into the prescribed form, reproducing it, and preparing it for delivery. Such payment shall not be included in the application of any incentive pricing formula.

k. Seller Identification of Technical Data.

Seller shall identify each item of "Technical Data" with the number of this order and the number of the prime contract under which this order is placed. Buyer agrees that it will not use "Technical Data" supplied by Seller pursuant to this order for other than Governmental purposes. Delivery of such technical data to the Government shall be effected through Buyer.

11. PATENTS — PROVISIONS AND RIGHTS —

a. Patent Provisions

1. Whenever any invention or discovery is made or conceived by Seller or its employees in the course of,

or under this order, Seller shall furnish the Commission with complete information thereon; and the Commission shall have the sole power to determine whether or not and where a patent application shall be filed and to determine the disposition of the title to and rights under any application or patent that may result. The judgment of the Commission on these matters shall be accepted as final; and Seller, for itself and for its employees, agrees that the inventor or inventors will execute all documents and do all things necessary or proper to carry out the judgment of the Commission.

2. No claim for pecuniary award or compensation under the provisions of the Atomic Energy Acts of 1946 and 1954 shall be asserted by Seller or its employees with respect to any invention or discovery made or conceived in the course of, or under this order.

3. Except as otherwise authorized in writing by the Commission, Seller will obtain patent agreements to effectuate the purposes of paragraphs 1 and 2 of this article from all persons who perform any part of the work under this order, except such clerical and manual labor personnel as will not have access to technical data.

4. Except as otherwise authorized in writing by the Commission, Seller will insert in all lower-tier orders provisions making this article applicable to the lower-tier Seller and its employees.

b. Patent Rights

Notwithstanding the disposition by the Commission, the Government shall retain the Patent Rights in Section IX,

paragraph 9-107.5(a) of the Armed Services Procurement Regulations as in effect on the date of this order.

c. It is recognized that during the course of the work under this order, Seller or its employees may from time to time desire to publish, within the limits of security requirements, information regarding scientific or technical developments made or conceived in the course of or under this order. In order that public disclosure of such information will not adversely affect the patent interests of the Government or the Seller, prior approval for release and publication shall be secured from the Buyer prior to any such release or publication.

12. PATENT INDEMNITY — Seller agrees to indemnify Buyer and the Government, their officers, agents, servants and employees against liability of any kind (including costs and expenses incurred) for the infringement of any United States Letters Patent (not including liability arising pursuant to Section 183, Title 35 (1952), U.S. Code, prior to the issuance of Letters Patent) occurring in the performance of this order or arising by reason of the use or disposal by or for the account of the Government of items manufactured or supplied under this order, except, however, any infringement necessarily resulting from Seller's compliance with written specifications or provisions for other than standard parts or components manufactured or supplied by Seller or resulting from specific written instructions given by the Government or Buyer for the purpose of directing a manner of performance of the order not normally utilized by Seller.

13. NOTICE AND ASSISTANCE REGARDING PATENT INFRINGEMENT

a. Seller shall report to Buyer, promptly and in reasonable written detail, each notice or claim of patent infringement based on the performance of this order of which Seller has knowledge.

b. In the event of any suit against Buyer, or the Government, or any claim against Buyer or the Government made before suit has been instituted, on account of any alleged patent infringement arising out of the performance of this order or out of the use of any supplies furnished or work or services performed hereunder, Seller shall furnish to Buyer or the Government upon request, all evidence and information in possession of Seller pertaining to such suit or claim. Such evidence and information shall be furnished at the expense of the Government except in those cases in which Seller has agreed to indemnify Buyer and the Government against the claim being asserted.

14. FURNISHED INFORMATION — Plans, drawings, specifications, designs, photographs and any other engineering and manufacturing information furnished by Buyer shall remain Buyer or Government property, as the case may be, shall be reproduced only as authorized in writing by Buyer, shall be used only for performance of the work under this order, and shall be returned to Buyer upon request, which request may be made during such performance or at termination or completion of the order, and Seller shall thereafter make no further use of any information derived therefrom without prior written consent of Buyer or the Government.

15. TRANSMISSION ABROAD OF EQUIPMENT OR TECHNICAL DATA RELATING TO NUCLEAR PROPULSION OF NAVAL SHIPS —

a. The supplies specified to be delivered under this order relate to Nuclear Propulsion of Naval Ships.

b. Except with the prior written consent of Buyer or the Government or its designated representative, Seller shall not, at any time during or after the performance of this order, transmit

or authorize the transmittal of any equipment or technical data, as defined in paragraph (c) below, (1) outside the United States or (2) irrespective of location, (i) to any foreign national not working on this order or on a lower-tier order hereunder, (ii) to any foreign organization (including foreign subsidiaries and affiliates of Seller), (iii) to any foreign government, or (iv) to any international organization.

c. As used in the article, the following terms shall have the following definitions:

1. 'United States' means the States, the District of Columbia, Puerto Rico, American Samoa, the Canal Zone, the Virgin Islands, Guam and any areas subject to the complete sovereignty of the United States;

2. 'equipment' means all supplies of the kind specified to be delivered under this order, all component parts thereof, and all models of such supplies and component parts; but 'equipment' does not include standard commercial supplies and component parts and models thereof.

3. 'technical data' means all professional, scientific, or technical information and data produced or prepared for the performance of this order or on or for the operation, maintenance, evaluation, or testing of any order item, whether or not the information and data were specified to be delivered under this order, including, without limitation, all writings, sound recordings, pictorial reproductions, and drawings or other graphical representations; but 'technical data' does not include such information and data on standard commercial supplies and component parts to the extent that the information and data do not relate

to the use, operation, maintenance, evaluation, and testing of such supplies and component parts in or in connection with any item, or component part thereof, specified to be delivered under this order.

d. Seller agrees to insert in all sub-tier orders under this order provisions which shall conform substantially to the language of this article, including this paragraph d.

e. Notwithstanding any other provisions of this article, this article shall not apply (1) where the transmittal or authorization for the transmittal of equipment or technical data is to be made pursuant to a contract or agreement to which the United States is a party, and (2) where the transmittal is to be of equipment or technical data which Buyer or the Government or its designated representative has declared in writing to Seller to be thereafter exempt from this article.

16. CONTROL OF VISITORS — Except with the prior written consent of Buyer, and the cognizant Contracting Officer or his designated representative, Seller shall not permit any visitor to a Seller's plant, office or facility to view or examine equipment specified to be delivered under this order, or major subassemblies of such equipment, or to obtain information or data concerning such equipment. As used in this article, "visitor" means any person who visits Seller's plant, office or facility and who does not represent either Seller, Buyer, or the Government in the performance of this order. Seller agrees to insert this article including this sentence in all subcontracts covering major subassemblies.

17. PUBLIC RELEASE OF INFORMATION — Information, data, photographs, sketches, advertising, etc., relating to the work under this order, which Seller desires to release or publish, shall be submitted to Buyer for approval eight (8) weeks prior to

the desired release date. As part of the approval request, Seller shall identify the specific media to be used as well as other pertinent details of the proposed release. All releases, regardless of tier of supplier, must have the prior approval of Buyer. Seller shall include all provisions of this article including this sentence in all subcontracts under this order.

18. LOWER-TIER SELLER COST AND PRICING DATA —

a. Seller shall require lower-tier Sellers hereunder to submit cost or pricing data under the following circumstances: (i) prior to award of any cost-reimbursement type, incentive, or price redeterminable subcontract; (ii) prior to the award of any subcontract the price of which is expected to exceed $100,000; (iii) prior to the pricing of any subcontract change or other modification for which the price adjustment is expected to exceed $100,000; except in the case of (ii) or (iii) where the price is based on adequate price competition, established catalog or market prices of commercial items sold in substantial quantities to the general public, or prices set by law or regulation.

b. Seller shall require lower-tier Sellers to certify, in the form set forth on Attachment I, that to the best of their knowledge and belief, the cost and pricing data submitted under a. above is accurate, complete and current as of the date of execution, which date shall be as close as possible to the date of agreement on the negotiated price of the order.

c. Seller shall insert the substance of this clause including this paragraph c. in each of his cost-reimbursement type, price redeterminable, or incentive subcontracts hereunder, and in any other subcontract hereunder which exceeds $100,000 except where the price thereof is based on adequate price competition, established catalog or market prices of commercial items sold in

substantial quantities to the general public, or prices set by law regulation. In each such excepted subcontract hereunder in excess of $100,000, Seller shall insert the substance of the following clause:

> Lower-tier Seller Cost and Pricing Data — Price Adjustments
>
> a) Paragraphs b) and c) of this clause shall become operative only with respect to any change or other modification made pursuant to one or more provisions of this order which involves a price adjustment in excess of $100,000. The requirements of this clause shall be limited to such price adjustments.
>
> b) Seller shall require lower-tier Sellers hereunder to submit cost or pricing data under the following circumstances; (i) prior to award of any cost-reimbursement type, incentive or price redeterminable subcontract; (ii) prior to award of any subcontract, the price of which is expected to exceed $100,000; (iii) prior to the pricing of any subcontract change or other modification for which the price adjustment is expected to exceed $100,000; except, in the case of (ii) or (iii), where the price is based on adequate price competition, established catalog or market prices of commercial items sold in substantial quantities to the general public, or prices set by law or regulation.
>
> c) Seller shall require lower-tier Sellers to certify, in the form set forth on Attachment I, that to the best of their knowledge and belief the cost and pricing data submitted under b) above is accurate, complete, and current as of the date of execution, which date shall be as close as possible to the date of agreement on the negotiated price of the order.

d) Seller shall insert the substance of this clause including this paragraph d) in each subcontract hereunder which exceeds $100,000.

19. AUDIT AND RECORDS —

(a) The Seller shall maintain books, records, documents and other evidence and accounting procedures and practices, sufficient to reflect properly all direct and indirect costs of whatever nature claimed to have been incurred and anticipated to be incurred for the performance of this order. The foregoing constitute "records" for the purpose of this article.

(b) The Seller's plants, or such part thereof as may be engaged in the performance of this order, and his records shall be subject at all reasonable times to inspection and audit by the Contracting Officer of the Government prime contract or his duly authorized Government representative. In addition, for purposes of verifying that cost or pricing data submitted, in conjunction with the negotiation of this order or any order change or other modification involving an amount in excess of $10,000, were accurate, complete and current, the Contracting Officer of the Government prime contract or his duly authorized Government representatives, shall — until the expiration of three years from the date of final payment under this order — have the right to examine those books, records, documents, papers and other supporting data which involve transactions related to this order or which will permit adequate evaluation of the cost or pricing data submitted, along with the computations and projections used therein.

(c) The Seller shall preserve and make available his records (i) until the expiration of three years from the date of final payment under this order, and (ii) for such longer period, if any,

as is required by applicable statute, or by other clauses of this order, or by (A) and (B) below.

(A) If this order is completely or partially terminated, the records relating to the work terminated shall be preserved and made available for a period of three years from the date of any resulting final settlement.

(B) Records which relate to litigation or the settlement of claims arising out of the performance of the Government prime contract, or of this order, shall be retained until such litigation or claims have been disposed of.

(d)(1) The Seller shall insert this article, including the whole of this paragraph (d), in each subcontract hereunder that is not firm fixed-price or fixed-price with escalation. When so inserted, changes shall be made to designate the higher-tier subcontractor of the level involved in place of the Seller and to change the amount in paragraph (b) above to $100,000.

(2) The Seller shall insert the following clause in each firm fixed-price or fixed-price with escalation subcontract hereunder which when entered into exceeds $100,000, except those subcontracts covered by subparagraph (3) below.

AUDIT

(a) For purposes of verifying that certified cost or pricing data submitted in conjunction with the negotiation of this subcontract or any contract change or other modification involving an amount in excess of $100,000 were accurate, complete, and current, the Contracting Officer of the Government prime contract, or his duty authorized Government

representatives, shall — until the expiration of three years from the date of final payment under this subcontract — have the right to examine those books, records, documents, papers and other supporting data which involve transactions related to this subcontract or which will permit adequate evaluation of the cost or pricing data submitted, along with the computations and projections used therein.

(b) The Subcontractor agrees to insert this article including this paragraph (b) in all subcontracts hereunder which when entered into exceed $100,000 unless the price is based on adequate price competition, established catalog or market prices of commercial items sold in substantial quantities to the general public, or prices set by law or regulation.

(3) The Seller shall insert the following clause in each firm fixed-price or fixed-price with escalation subcontract hereunder which when entered into exceeds $100,000 where the price is based on adequate price competition, established catalog or market prices of commercial items sold in substantial quantities to the general public, or prices set by law or regulation.

AUDIT — PRICE ADJUSTMENTS

(a) This clause shall become operative only with respect to any change or other modification of this subcontract, which involves a price adjustment in excess of $100,000 unless the price adjustment is based on adequate price competition, established catalog or market prices of commercial items sold in substantial quantities to the general public, or prices set by law or regulation.

(b) For purposes of verifying that any certified cost or pricing data submitted in conjunction with a contract change or

other modification were accurate, complete, and current, the Contracting Officer of the Government prime contract, or his duly authorized Government representatives, shall — until the expiration of three years from the date of final payment under this subcontract — have the right to examine those books, records, documents, papers and other supporting data which involve transactions related to this subcontract or which will permit adequate evaluation of the cost of pricing data submitted, along with the computations and projections used therein.

(c) The Subcontractor agrees to insert this article including this paragraph (c) in all subcontracts hereunder which when entered into exceed $100,000.

20. PRICE REDUCTION FOR DEFECTIVE COST OR PRICING DATA

a. If Buyer determines that any price, including profit or fee, negotiated in connection with this order was increased by any significant sums because Seller, or any lower-tier Seller in connection with a subcontract covered by b. below, furnished incomplete or inaccurate cost or pricing data or data not current as certified in Seller's Certificate of Current Cost or Pricing Data, then such price shall be reduced accordingly and the order shall be modified in writing to reflect such adjustment.

b. Seller agrees to insert the substance of paragraphs a. and b. of this article in each of his cost-reimbursement type, price redeterminable, or incentive subcontracts hereunder, and in any other subcontract hereunder in excess of $100,000, unless the price is based on adequate price competition, established catalog or market prices of commercial items sold in substantial quantities to the general public, or prices set by law or regulation. In each such excepted subcontract hereunder which exceeds $100,000, Seller shall insert the substance of the following article.

Price Reduction for Defective Cost or Pricing Data — Price Adjustments

a. This article shall become operative only with respect to any change or other modification made pursuant to one or more provisions of this order which involves a price adjustment in excess of $100,000, except where the price is based on adequate price competition, established catalog or market prices of commercial items sold in substantial quantities to the general public, or prices set by law or regulation. The right to price reduction under this article shall be limited to such price adjustments.

b. If Buyer determines that any price, including profit or fee, negotiated in connection with any price adjustment within the purview of paragraph a. above was increased by any significant sum because Seller or any of his lower-tier Sellers in connection with a subcontract covered by paragraph c. below, furnished incomplete or inaccurate cost or pricing data, or data not current as of the date of execution of Seller's Certificate of Current Cost or Pricing Data, then such price shall be reduced accordingly and the order shall be modified in writing to reflect such adjustment.

c. Seller agrees to insert the substance of this article in each subcontract hereunder which exceeds $100,000.

c. If the Government or any of its duly authorized representatives determines that the price, including profit, of this order or any subcontract under this order was increased by any sum because Seller or any of his lower-tier Sellers required to furnish a Certificate of Current Cost or Pricing Data, furnished incomplete or inaccurate cost or pricing data or data not current

as of the date of execution of the Certificate, then the price of this order shall be reduced by the amount by which the price of Buyer's prime contract is reduced and Seller shall reimburse Buyer accordingly. This obligation shall survive this order.

21. TITLE — Title to all materials and supplies purchased under this order shall vest in the Government whenever title passes from Seller.

22. APPLICABLE LAWS — This order shall be governed in all respects by the laws of the State of New York.

23. PROPRIETARY INFORMATION — Any knowledge or information which Seller shall have disclosed or may hereafter disclose to Buyer incident to the placing and filling of this order shall not, unless otherwise specifically agreed upon in writing by Buyer, be deemed to be Seller proprietary information, and accordingly shall be acquired free from any restrictions (other than restrictions which may result from a claim for patent infringement).

24. NOTICE OF LABOR DISPUTES — Whenever an actual or potential labor dispute is delaying or threatens to delay the performance of the work Seller shall immediately notify Buyer in writing. Such notice shall include all relevant information concerning the dispute and its background.

25. PRIORITIES, ALLOCATIONS AND ALLOTMENTS — Seller shall follow the provisions of DMS Regulation 1 and all other applicable regulations and orders of the Business and Defense Services Administration in obtaining controlled materials and other products and materials needed to fill this order.

26. ASSIGNMENT —

a. Neither this order nor any interest therein nor claim thereunder shall be assigned or transferred by Seller, except as expressly authorized in writing by Buyer.

b. In no event shall copies of this order or of any plans, specifications, or other similar documents relating to work under this order, if marked "Top Secret," "Secret," or "Confidential," be furnished to any assignee of any claim arising under this order or to any other person not entitled to receive the same. However, a copy of any part or all of this order so marked may be furnished or any information contained therein may be disclosed, to such assignee upon the prior written authorization of Buyer.

c. This order or any and all rights thereunder may be assigned by Buyer to the Government or any designee of the Government, provided that written notice thereof is given to Seller.

27. SUBCONTRACTING — Seller agrees to perform this order in accordance with the Subcontracting Program set forth in the order except as hereafter provided.

a. If Seller wishes to make any additions to or substitutions in its Subcontract Program, Seller shall notify Buyer in writing reasonably in advance and shall submit justification in sufficient detail to permit evaluation of the proposed change. Seller shall not make any additions to or substitutions to the Subcontract Program without the prior written consent of Buyer.

b. In the event that no Subcontract Program is included in this order, and subsequent to contract award Seller decides to subcontract all or a substantial portion of the work on any

deliverable item(s) to be furnished under this order. Seller shall not do so without the prior written consent of Buyer.

c. The provisions of this article do not apply to purchases of raw materials, standard commercial supplies, qualified products list items, and hardware items.

28. SET-OFF — Buyer shall be entitled at all times to set-off against any amount payable by Buyer in connection with this order, any amount owed by Seller to Buyer arising from transactions relating to Buyer's order.

29. PERMITS — Except as otherwise directed by Buyer, Seller shall procure all necessary permits or licenses and abide by all applicable laws, regulations, and ordinances of the United States and of the State, territory, and political subdivision in which the work under this order is performed.

30. SPECIAL MATERIALS — Special measures as delineated in the order shall be taken by Seller for the protection of and accounting for any source, special nuclear and special reactor materials supplied to it, in accordance with regulations and requirements of the cognizant Government agency and Buyer.

31. DEFAULT —

a. Buyer may, subject to the provisions of paragraph c. below, by written Notice of Default to Seller, terminate the whole or any part of this order in any one of the following circumstances: (1) if Seller fails to make delivery of the supplies or to perform the services within the time specified herein or any extension thereof, or (2) if Seller fails to perform any of the other provisions of this order, or so fails to make progress as to endanger performance of this order in accordance with its terms, and in either of these two circumstances does not cure such

failure within a period of ten (10) days (or such longer period as Buyer may authorize in writing) after receipt of formal notice from Buyer specifying such failure.

b. In the event Buyer terminates this order in whole or in part as provided in paragraph a. of this article, Buyer may procure, upon such terms and in such manner as Buyer may deem appropriate, supplies or services similar to those so terminated, and Seller shall be liable to Buyer for any excess costs for such similar supplies or services; provided, however, that Seller shall continue the performance of this order to the extent not terminated under the provisions of this article.

c. Except with respect to defaults of lower-tier subcontractors, Seller shall not be liable for any excess costs if the failure to perform the order arises out of causes beyond the control and without the fault or negligence of Seller. Such causes may include, but are not restricted to, acts of God or of the public enemy, acts of the Government in either its sovereign or contractual capacity, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather but in every case the failure to perform must be beyond the control and without the fault or negligence of Seller. If the failure to perform is caused by the default of a lower-tier subcontractor, and if such default arises out of causes beyond the control of both Seller and the lower-tier subcontractor, and without the fault or negligence of either of them, Seller shall not be liable for any excess costs for failure to perform, unless the supplies or services to be furnished by the lower-tier subcontractor were obtainable from other sources in sufficient time to permit Seller to meet the required delivery schedule.

d. If this order is terminated as provided in paragraph a. of this article, Buyer, in addition to any other rights provided in this article, may require Seller to transfer title and deliver to

Buyer, in the manner and to the extent directed by Buyer, (1) any completed supplies, and (2) such partially completed supplies and materials, parts, tools, dies, jigs, fixtures, plans, drawings, information, and contract rights (hereinafter called "manufacturing materials") as Seller has specifically produced or specifically acquired for the performance of such part of this order as has been terminated; and Seller shall, upon direction of Buyer, protect and preserve property in possession of Seller in which Buyer or Government has an interest. Payment for completed supplies delivered to and accepted by Buyer shall be at the order price. Payment for manufacturing materials delivered to and accepted by Buyer and for the protection and preservation of property shall be in an amount agreed upon by Seller and Buyer.

e. If, after notice of termination of this order under the provisions of paragraph a. of this article, it is determined that the failure to perform this order is due to causes beyond the control and without the fault or negligence of Seller or lower-tier subcontractor pursuant to the provisions of paragraph b. of this article, such Notice of Default shall be deemed to have been issued pursuant to the article of this order entitled, "Termination," and the rights and obligations of the parties hereto shall, in such event, be governed by such article.

f. The rights and remedies of the Buyer provided in this article shall not be exclusive and are in addition to any other rights and remedies provided by law or under this order.

32. SUSPENSION OF WORK FOR THE CONVENIENCE OF THE BUYER — Buyer may by written notice, direct Seller to suspend all or any part of the work for such period of time as may be determined by Buyer to be necessary or desirable for its convenience. If such suspension unreasonably delays the

progress of the work and causes additional expense or loss to Seller in the performance of the work, not due to the fault or negligence of Seller, an equitable adjustment in the price and the time for performance shall be made by agreement of the parties, and the order shall be modified in writing accordingly; provided, however, that any claim by Seller for an adjustment hereunder must be asserted within thirty (30) days from the date of a start order for resumption of work.

33. WORK ON BUYER, GOVERNMENT OR OTHER PREMISES —

a. As to the work to be done, or service to be performed by Seller on Buyer premises, Government premises, or the premises of other Buyer subcontractors, Seller assumes entire responsibility and liability for losses, expenses, damages, demands, and claims in connection with or arising out of any injury or alleged injury (including death) or damage or alleged damage to property, sustained or alleged to have been sustained in connection with or to have arisen out of performance of the work. Seller will indemnify and save harmless the Government and Buyer from and against any and all claims, demand, actions, causes of action, suits, damages, expenses (including attorney's fees) and liabilities whatsoever resulting from or arising in any manner on account of or by reason of any injury to or death of any person or any damage to or loss of property which may occur or be alleged to have occurred as a result of or in connection with the performance of this order. Nothing in the foregoing shall be construed to require Seller to indemnify and save harmless the Government and the Buyer from any liability arising out of or resulting from a nuclear incident.

b. Seller agrees to comply with all applicable laws, rules and regulations with respect to workmen's compensation or occupational disease, or withholding and payment of social

security and federal income taxes, and to obtain similar agreements from all its subcontractors; and Seller further agrees to indemnify Buyer and the Government, against and to save and hold harmless Buyer and the Government from any and all liability and expense with respect to claims against Buyer or the Government which may result from the failure or alleged failure of Seller or of any of its subcontractors to comply therewith.

34. FAIR LABOR STANDARDS ACT — Seller will comply with the requirements of the Fair Labor Standards Act of 1938 (29 U.S. Code 201-219), as amended.

35. ANTI-KICKBACK ACT — Seller will comply with the requirements of the Anti-kickback Act of 1946 as amended.

36. USE OF GOVERNMENT PROPERTY, SPECIAL TOOLING, OR SPECIAL TEST EQUIPMENT — Use of Government property, special tooling, or special test equipment on this order by Seller is not authorized; and Seller agrees to execute this order without making use on any basis of Government-owned land, buildings, machine tools, equipment, special tooling, special test equipment, or other facilities without the prior approval of the Buyer.

37. PREPRODUCTION COSTS — Seller agrees that all preproduction and start-up costs and other non-recurring charges that Seller is absorbing under this order shall not be charged to Buyer, the Government or any other Naval Reactors prime contractor in any future procurement.

38. COMPLIANCE WITH ARMED SERVICES PROCUREMENT REGULATIONS — The following clauses a. through u., provisions of the Armed Services Procurement Regulations, as in effect on the date of this order, apply. In each

case, the word "Contractor" shall mean "Seller," the word "Contract" shall mean "Order," and the words "Contracting Officer," shall mean "Buyer,"

a. Buy American Act — ASPR 6-104.5

b. Convict Labor — ASPR 12-203.

c. Convenant Against Contingent Fees — ASPR 7-103.20.

d. Examination of Records — ASPR 7-104.15 except that the Department of Navy or any of its duly authorized Government representatives shall have the same rights provided the Comptroller General of the United States or any of the Comptroller General's duly authorized representatives.

e. Excess Profit — ASPR 7-104.11(a).

f. Filing of Patent Applications — ASPR 9-106.

g. Government Property — If Government property is to be furnished to the Seller under this order, the clauses set forth in the Armed Services Procurement Regulations, Section XIII, paragraphs 13-702(a) and 13-702(c) as in effect or the date of this order shall apply except that where appropriate for changes, Article 6, titled — "Changes, Extras, and Substitutions" of these terms and conditions shall apply.

h. Interest — The article set forth in the Armed Services Procurement Regulations, Appendix E, paragraph 620 applies. Where necessary to make the above article applicable to this order the term "Government" shall be deemed to refer to "Buyer."

i. Equal Opportunity — ASPR 12-802(a) modified as follows:

Delete references to "the President's Committee on Equal Employment Opportunity, Executive Order 10925 of March 6, 1961, as amended, and Section 303 of Executive Order No. 10925 of March 6, 1961, as amended" and substitute therefor "the Secretary of Labor, Executive Order No. 11245 of September 24, 1965, and Section 204 of Executive Order 11246 of September 24, 1965," respectively.

In accordance with regulations of the Secretary of Labor, the rules, regulations, orders, instructions, designations and other directives issued by the President's Committee on Equal Employment Opportunity and those issued by the heads of various departments or agencies under or pursuant to any of the Executive Orders superseded by Executive Order 11246, shall, to the extent that they are not inconsistent with Executive Order 11246, remain in full force and effect unless and until revoked or superseded by appropriated authority. Reference in such directives to provisions of the superseded orders shall be deemed to be references to the comparable provisions of Executive Order 11246.

j. Renegotiation — ASPR 7-103.13(a).

k. Responsibility for Supplies — ASPR 7-103.6.

l. Military Security Requirement — ASPR 7-104.12(a).

m. Special Tooling and Special Test Equipment

(1) Except as to special tooling and special test equipment specified to be delivered to Buyer as an end item under this order, the clauses set forth in Section XIII,

paragraphs 13-704 and 13-705, respectively, of the Armed Services Procurement Regulation shall apply to all special tooling or special test equipment, (as defined in the ASPR clause) acquired or manufactured by Seller for use in the performance of this order, full cost of which is charged to this order.

(2) Seller agrees that, in placing any orders, under this order which involve the use of special tooling or special test equipment, the full cost of which is charged to each order, it will include therein appropriate provisions to obtain rights comparable to those granted Buyer and the Government by this article, and agrees that it will exercise such rights for the benefit of Buyer and the Government, as Buyer may direct.

n. Termination — Without limiting Buyer's right to terminate this order for default of Seller as provided in the article titled, "Default," Buyer may terminate all or any part of the work under this order in accordance with the provisions of the subcontract termination article set forth in paragraph 8-706 of the Armed Services Procurement Regulation in effect on the date of this order except that the time limit for submittal of termination claims as specified in paragraph (c) of such clause is changed to read, "four (4) months from the effective date of termination or such further period as may be mutually agreed upon."

o. Utilization of Concerns in Labor Surplus Areas — ASPR 1-805.3(a).

p. Labor Surplus Area Subcontracting Program — ASPR 1-803(b).

q. Utilization of Small Business — ASPR 1-707.3(a).

r. Small Business Subcontracting Program — ASPR 1-707.3(b).

s. Walsh-Healey Public Contract Act — ASPR 12-605.

t. Contract Work Hours Standards Act — Overtime Compensation — ASPR 12-303.

u. Duty-Free Entry — Canadian Supplies — ASPR 6.605.2.

39. COST SUPPORT AND CERTIFICATION RELATIVE TO AMENDMENTS

a. When required by Buyer, Seller shall furnish certified cost and pricing data for any proposed amendment to this order with a price impact of $10,000. or more as indicated below:

1. A properly executed DD Form 1107, Change Order Price Analysis, shall be submitted in support of proposals made pursuant to an inquiry to Seller involving technical changes or the "Changes" Article of this order.

2. A properly executed DD Form 633, Contract Pricing Proposal shall be submitted in support of proposals for the addition of line items or increases in the quantity of current line items in this order.

Upon completion of negotiations relative to the proposals described in a. above, Seller shall submit an updated DD Form 1107 or DD Form 633, as appropriate, and a Certificate of Current Cost or Pricing Data (in the form set forth in Attachment No. 1 hereto) in support thereof.

Affidavit of James H. Sullivan

40. ORDER OF PRECEDENCE — In the event of any inconsistency between any provisions of this order, the order of precedence shall be as follows: the purchase order, the Terms and Conditions of Purchase, the Administrative requirements, the Equipment Specification and any specifications or drawings referenced therein.

Affidavit of James H. Sullivan

ATTACHMENT NO. 1

CERTIFICATE OF CURRENT COST OF PRICING DATA

This is to certify that, to the best of my knowledge and belief, cost or pricing data as defined in ASPR 3-807.3(c) submitted, either actually or by specific identification in writing (see ASPR 3-807.3(f)), to the Buyer or his representative in support of _____* are accurate, complete, and current as of _____**.
day month year

Firm: _____

Name: _____

Title: _____

_____
Date of Execution***

*Describe the proposal, quotation, request for price adjustment or other submission involved, giving appropriate identifying number (e.g., RFP NO.____).

**This date shall be the date when the price negotiations were concluded and the purchase order price was agreed to. The responsibility of the Seller is not limited by the personal knowledge of the Seller's negotiator if the Seller had information reasonably available (see ASPR 3-807.5(a)) at the time of agreement, showing that the negotiated price is not based on accurate, complete and current data.

***This date should be as close as practicable to the date when the price negotiations were concluded and the purchase order price was agreed to.

AFFIDAVIT OF F.J. BALICKI, FILED MAY 31, 1977 WITH ATTACHMENTS

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 76-794

[TITLE OMITTED]

STATE OF NEW YORK)
SS
COUNTY OF SCHENECTADY)

F. J. BALICKI, being duly sworn, deposes and states:

1. I have been an employee of the General Electric Company ("G.E.") since 1965 and am presently the manager of Procurement Operations of G.E.s Machinery Apparatus Operation ("M.A.O.") and have been since 1974. I submit this Affidavit in support of G.E.'s Cross-Motion for Partial Summary Judgment and Opposition to the Motion of Plaintiff Curtiss-Wright Corporation ("Curtiss-Wright") for Partial Summary Judgment and to Strike Certain Defenses and to Dismiss the Counterclaim. I have personal knowledge of the matters set forth herein.

2. Between April 12, 1968, and September 29, 1972, G.E. and Curtiss-Wright entered into a series of 21 purchase orders by which Curtiss-Wright agreed to produce, for delivery to the United States Navy ("Navy"), certain components used in the propulsion systems of nuclear submarines and surface vessels. These purchase orders were designated with the following numbers: A-550, A-595, A-641, A-642, A-656, A-661, A-675, A-113, B-384, B-382, B-425, B-423, B-412, B-410, B-428, B-429, B-433, B-442, B-452, B-451, and B-478.

3. Incorporated by reference within each of the purchase orders listed in Paragraph 2 above is Article 5c of the "Terms & Conditions of Purchase" that are appended as Exhibit D to the Affidavit of James H. Sullivan filed by Curtiss-Wright in this action. Article 5c provides in its entirety:

> "Seller [Curtiss-Wright] and each assignee under an assignment in effect at the time of final payment agree as a condition precedent to final payment, that the Buyer and the Government, their respective officers, agents and employees are released from all liabilities, obligations and claims arising under or by virtue of this order. Seller further agrees that the final invoice shall constitute not less than 10 percent (10%) of the total order price."

4. In July 1968, I was the Senior Contract Negotiator with primary responsibility on behalf of G.E. for the negotiation of A-595 with Curtiss-Wright. A-595 was the second of the 21 purchase orders entered into between G.E. and Curtiss-Wright.

5. During the negotiations for A-595, the negotiators for Curtiss-Wright sought to exclude from this purchase order a provision for the withholding of money until final payment. Although G.E. made some concessions on other matters during the negotiations for this purchase order, the provision for withholding was not excluded, and Curtiss-Wright agreed to its inclusion. As stated in Paragraph 3 above, a provision for withholding has been agreed to by Curtiss-Wright in each and every purchase order involved in this action, including those entered into subsequent to A-595.

6. I would like to explain briefly the process by which final payments may be made under each of the purchase orders listed

in Paragraph 2 above. Each of these purchase orders is a "maximum-price-redeterminable-downward-only" contract. Accordingly, before the amount of final payment can be calculated, a final fixed price must be established through "redetermination." The contracts require that this be accomplished by means of a formal amendment to the purchase order, derived as a result of negotiation between G.E. and Curtiss-Wright. Before this amendment is formally executed by Curtiss-Wright, however, it must be reviewed and approved by the Navy because, under the terms of the contracts between the Navy and G.E. and the purchase orders between G.E. and Curtiss-Wright, as well as the Armed Services Procurement Regulations, the Navy must approve all amendments which establish a firm fixed price by redetermination. Therefore, without Navy approval the amendment necessary to make final payment cannot be issued.

7. With respect to purchase orders B-382, B-384, B-410, B-412, and B-425 — the purchase orders which are the subject of the Seventeenth Count of the Amendment To And Supplemental Complaint — G.E. and Curtiss-Wright have agreed to, and the Navy has approved, an amount representing the redetermined firm fixed price, less progress and liquidation payments. This amount is $3,673,584.00. However, when Curtiss-Wright executed the final amendment to each purchase order that would reflect this agreement, it purported to do so only "conditionally," as reflected in the letter which is appended as Exhibit B to the Sullivan Affidavit. Similarly, Curtiss-Wright submitted invoices, for each of these purchase orders, containing a statement that, "[n]otwithstanding any provision of this order to the contrary, [Curtiss-Wright] reserves all rights arising out of the loss . . . on this and other orders which is the subject of a Request for Extraordinary Contractual Relief under P.L. 85-804 filed with the Department of the Navy."

8. Because the actions of Curtiss-Wright described in Paragraph 7 above were inconsistent with Article 5c of the "Terms and Conditions of Purchase," the invoices for these purchase orders were returned to Curtiss-Wright. Subsequently, these invoices were again submitted by Curtiss-Wright and accompanied by a "qualified release" in which Curtiss-Wright purported to release G.E. and the Government from all claims except those which are the subject of this action. A copy of this qualified release has been appended as Exhibit C to the Sullivan Affidavit.

9. With respect to purchase orders A-550, A-595, A-642, B-423, B-429, B-433, and B-442 — the purchase orders which are the subject of the Eighteenth Count of the Amendment To And Supplemental Complaint — the processing of the "Final Price Redetermination Amendments" has not been completed because of Curtiss-Wright's representation that these amendments would similarly be executed "conditionally." Indeed, Curtiss-Wright has submitted invoices for these purchase orders containing the "qualified release" referred to in Paragraph 8 above. Since, as of this writing, G.E.'s recommendations with respect to a redetermined firm fixed price have not been submitted to, or acted upon by, the Navy as to three of the orders (A-550, A-595, and A-642), the cumulative redetermined firm fixed price for the orders which are the subject of the Eighteenth Count of the Amendment To And Supplemental Complaint may not prove to be exactly $4,704,952.00, as Curtiss-Wright alleges. As stated previously, the approval of the Navy is necessary before the final amendment fixing the final price of these purchase orders may be executed between G.E. and Curtiss-Wright.

10. With respect to A-550 and A-595, wholly apart from Curtiss-Wright's failure to comply with Article 5c of the "Terms and Conditions of Purchase," there are additional items to be delivered by Curtiss-Wright before final payments may be made.

These items are not the large components that were called for by the purchase orders themselves, but include hardware and software which relate to the large components.

11. Although M.A.O. considers that it is the Navy's lawful prerogative to decline to approve any amendment authorizing final payment to Curtiss-Wright, as long as Curtiss-Wright seeks to deviate from the provisions of Article 5c, nonetheless, on three occasions, representatives of M.A.O. have recommended to the Navy that perhaps, in this instance, it should waive strict compliance with Article 5c. On each occasion the Navy has disapproved that recommendation. The letters containing the responses to these recommendations are self-explanatory and are appended hereto as Exhibits A, B, and C.

12. G.E.'s Counterclaim and the portion of its Answer containing its set-off were reviewed by the Navy prior to their filing in this action. The Navy raised no objection to G.E.'s asserting the set-off and Counterclaim, including those Counts of the Counterclaim which were stated to be for the ultimate benefit of the Navy.

s/ F. J. Balicki
F. J. Balicki

Sworn to May 26th, 1977.

EXHIBIT A

ASSISTANT NAVAL SEA SYSTEMS COMMAND
TECHNICAL REPRESENTATIVE
MACHINERY APPARATUS OPERATION
P.O. BOX 1021
SCHENECTADY, NEW YORK 12301

In Reply
3/5-3034/75
5800/1
CWC
5 December 1975

From: Assistant Naval Sea Systems Command Technical Representative, MAO
To: General Electric Company
Machinery Apparatus Operation
P.O. Box 1021
Schenectady, New York 12301
Attn: F.J. Balicki, Manager-Administration Operation

Subj:
Curtiss-Wright Conditional Acknowledgement of Redetermination Amendments

Ref:
(a) MAO ltr P5-256 dtd 7 November 1.75

1. Reference (a) requests ANSTR review and consent to a revision to the CWC redetermination cut off clause. ANSTR does not agree with reference (a).

2. ANSTR has no objection to the inclusion of the following:

Affidavit of F.J. Balicki

Seller reserves the right to pursue its request for extraordinary contractual relief under PL85-804 filed with the Department of the Navy.

3. The action taken by this letter is considered by the Government to be within the scope of existing prime contracts between MAO and the Government and does not authorize any delay in delivery or additional cost to the Government, either direct or indirect.

s/ H.A. Cardinale
H.A. CARDINALE

Affidavit of F.J. Balicki

EXHIBIT B

DEPARTMENT OF THE NAVY
NAVAL SEA SYSTEMS COMMAND
WASHINGTON, D.C. 20362

IN REPLY REFER TO
0246/WM
4280
Ser 484

General Electric Company
Machinery Apparatus Operation
P.O. Box 1021
Schenectady, New York 12301
Attention:
Mr. E. F. Phelps
General Manager

RECEIVED
F.J. BALICKI
JUL 29 1976
ADMINISTRATION OP.

Dear Sir:

Your letter of 14 July 1976 recommends acceptance of a qualified and partial claims release and final payment of withheld amounts on certain General Electric Company, Machinery Apparatus Operation (MAO) subcontracts with Curtiss-Wright Corporation. Briefly, the claims release which Curtiss-Wright proposes to give MAO would exclude claims set forth in a pending civil action filed by Curtiss-Wright against General Electric.

Affidavit of F.J. Balicki

As your letter notes, the basic issue is whether Curtiss-Wright should receive final payment on the orders in question while pursuing claims under these same orders. It is noted that such an action would be in direct conflict with Article 5, paragraph c, of the terms and conditions applicable to the subcontracts in question which requires an unqualified claims release as a condition precedent to final payment. Article 5c serves to encourage timely submittal and resolution of vendor claims. The action proposed by MAO would defeat this purpose of Article 5c.

Since Curtiss-Wright entered into these subcontracts cognizant of the terms and conditions, Curtiss-Wright either knew or should have known the consequences of not giving MAO an unqualified claims release at the time when final payment otherwise was due. Undoubtedly a part of the consideration received by Curtiss-Wright from MAO under the subcontracts was for Article 5c. Apparently, MAO would not receive consideration in return for deletion of the contract requirement for an unqualified claims release.

Notwithstanding the clarity of the subcontract terms which your letter appears to acknowledge, you raise the question of whether continued withholding under the subcontracts is conscionable and enforceable under the circumstances. The claims which Curtiss-Wright proposes be excepted from the claims release were filed years after the contracts were entered, and in many cases years after the occurrence of the events on which the claims are based. Curtiss-Wright was or should have been fully cognizant that this late identification of claims likely would result in withholding of final payment until the claims were resolved. Based on the above, it is clear that the existence of outstanding claims at the time when final payment otherwise would be due is the result of Curtiss-Wright's own actions, the consequences of which were or should have been known to Curtiss-Wright.

Affidavit of F.J. Balicki

Your letter draws an analogy between the claims release which you propose to accept and that judged acceptable to NAVSEA regarding the Curtiss-Wright Public Law 85-804 request. This analogy is not valid. Because the Curtiss-Wright Public Law 85-804 request was a direct Curtiss-Wright-NAVSEA concern, extracontractual in nature and not a claim under the subcontracts, Curtiss-Wright was not contractually obligated to give MAO a release of their right to pursue the Public Law 85-804 request. However, Curtiss-Wright's present pursuit of claims against MAO under its subcontracts requires, by the terms and conditions of the subcontracts, a withholding of monies until such time as an unqualified claims release is effected.

Another troublesome aspect of your proposed action is the dangerous precedent it would set for other subcontractors. By making a claims release a negotiable issue with vendors when final payment is otherwise due, the article's intent would be negated. There would be no incentive for subcontractors to resolve claims in a timely manner.

Based on the above, the qualified claims release proposed by Curtiss-Wright is not acceptable. Accordingly, your request for consent to the redetermination amendments between MAO and Curtiss-Wright is not granted.

Sincerely,

s/ William Mohney
WILLIAM MOHNEY
CONTRACTING OFFICER

EXHIBIT C

DEPARTMENT OF THE NAVY
NAVAL SEA SYSTEMS COMMAND
WASHINGTON, D.C. 20362

IN REPLY REFER TO
0246/WM
4280
Ser 1451

RECEIVED
DEC 21, 1976
R.C. RADICE
15 DEC 1976

General Electric Company
Machinery Apparatus Operation
Post Office Box 1021
Schenectady, New York 12301
Attn:
E.F. Phelps
General Manager

Ref:
(a) MAO ltr MAO-A6-91U of 14 Jul 76
(b) NAVSEA ltr 0246/WM 4280 Ser 484 of 28 Jul 76
(c) MAO ltr MAO-A6-131U of 27 Oct 76

Reference (a) requested Contracting Officer consent to redetermination amendments on subcontracts between the General Electric Company and Curtiss-Wright Corporation. Under your proposal, final payment would have been made to Curtiss-Wright and the subcontracts would have been redetermined upon receipt of a qualified claims release which

would have excluded claims set forth in a pending lawsuit filed by Curtiss-Wright against General Electric.

By reference (b), the Contracting Officer declined to grant consent to the redetermination amendments on the basis that the qualified release of claims offered by Curtiss-Wright does not meet the subcontract requirement for an unqualified release of claims prior to final payment.

Reference (c) against requests Contracting Officer consent to the redetermination amendments based on qualified claims releases from Curtiss-Wright. In addition, reference (c) recommends use of a surety bond to be procured by Curtiss-Wright.

The concept of a surety bond was noted in reference (a), and this approach was considered by the Contracting Officer in preparing reference (b). The Contracting Officer concluded that a surety bond or any other contractual vehicle which would allow final payment of withheld amounts prior to obtaining an unqualified claims release was not acceptable for the following reasons:

1. The principal purpose of the contract clause requiring an unqualified claims release prior to final payment is to encourage the timely submission and resolution of any claims which the supplier may have.

2. The claims release provision has been accepted by Curtiss-Wright in all its contracts for the Naval Nuclear Propulsion Program.

3. Release of withholding or use of a surety bond would defeat the purpose of the contract clause in question and could set a precedent whereby other Naval Nuclear .Propulsion

Program suppliers might conclude that they would be better off *not* to identify and settle claims promptly.

4. Curtiss-Wright's decision to submit large claims late in the performance of its orders results in the current withholding. Such withholding is in accordance with the terms of the contracts Curtiss-Wright entered into. Thus, there is no basis for extraordinary contractual vehicles such as a surety bond to relieve Curtiss-Wright of its contractual commitments.

Based on the above, your proposal to accept a qualified claims release and to release of final payments on Curtiss-Wright subcontracts, subject to a surety bond, is not acceptable. Accordingly, Contracting Officer consent to the redetermination amendments is not granted.

Sincerely,
s/ William Mohney
WILLIAM MOHNEY
CONTRACTING OFFICER

AFFIDAVIT OF J.A. RUSSELL, FILED MAY 31, 1977

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 76-794

[TITLE OMITTED]

STATE OF NEW YORK)
) SS
COUNTY OF SCHENECTADY)

J. A. RUSSELL, being duly sworn, deposes and states:

1. I have been an employee of the General Electric Company ("G.E.") since 1950 and am presently assigned to the Finance Section of G.E.'s Machinery Apparatus Operation ("M.A.O") and have been since 1976. I submit this Affidavit in support of G.E.'s Cross-Motion for Partial Summary Judgment and Opposition to the Motion of Plaintiff Curtiss-Wright Corporation ("Curtiss-Wright") for Partial Summary Judgment and to Strike Certain Defenses and to Dismiss the Counterclaim. I have personal knowledge of the matters set forth herein.

2. My responsibilities at M.A.O. include, among others, participation in the negotiation and administration of the prime contracts between G.E. and the United States Government by the authority of which M.A.O. participates in the Naval Nuclear Program.

3. Each of the prime contracts pursuant to which M.A.O. entered into the 21 purchase orders with Curtiss-Wright that are involved in this action is a cost-plus-fixed-fee contract. The prime contracts each contain the following clause (Article 6(c), General Provisions, Cost-Reimbursement Type Research and Development Contract):

> "Promptly after receipt of each invoice or voucher and statement of cost, the Government shall . . . make payment thereon as approved by the Contracting Officer."

Accordingly, G.E. is reimbursed by the United States Government for costs which it incurs in managing the 21 purchase orders with Curtiss-Wright.

4. Each of the prime contracts referred to in Paragraph 3 above contains the following clauses (Articles 6(d) and 6(f), General Provisions, Cost-Reimbursement Type Research and Development Contract):

> "At any time or times prior to final payment under this contract, the Contracting Officer may have the invoices or vouchers and statements of cost audited. Each payment theretofore made shall be subject to reduction for amounts included in the related invoice or voucher which are found by the Contracting Officer, on the basis of such audit, not to constitute allowable costs. Any payment may be reduced for overpayments, or increased for underpayments, on preceding invoices or vouchers.
>
> * * *
>
> "The Contractor [G.E.] agrees that any refunds, rebates, credits, or other amounts (including any interest thereon) accruing to or received by the Contractor or any assignee under this contract shall be paid by the Contractor to the Government, to the extent that they are properly allocable to costs for which the

> Contractor has been reimbursed by the Government under this Contract."

5. By operation of the clauses quoted in Paragraph 4 above, any amounts recovered by G. E. in this action that represent costs which have been incurred by G.E. and reimbursed by the United States Government must be paid to the United States Government by G.E.

s/ John A. Russell
J. A. RUSSELL

Sworn to May 26th, 1977.

STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE ISSUE

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 76-794

[TITLE OMITTED]

Pursuant to Rule 12F of this Court, Defendant General Electric Company ("G.E.") respectfully submits that the following are the material facts relevant to its Cross-Motion For Partial Summary Judgment as to which there is no genuine issue to be tried.

1. Between 1968 and 1972, G.E. and the Curtiss-Wright Corporation ("Curtiss-Wright") entered into a series of 21 purchase orders by which Curtiss-Wright agreed to produce, for delivery to the United States Navy ("Navy"), certain components used in the propulsion systems of nuclear submarines and surface vessels. Among these 21 purchase orders were purchase orders designated with the following numbers: B-382, B-384, B-410, B-412, B-425, A-550, A-595, A-642, B-423, B-429, B-433, and B-442. (Balicki Affidavit ¶ 2; Sullivan Affidavit ¶ 2.)

2. The following clause appears within each of the 21 purchase orders referred to in Paragraph 1 above:

> "Seller and each assignee under an assignment in effect at the time of final payment agree as a condition precedent to final payment that the Buyer and the Government, their respective officers, agents and employees are released from all liabilities, obligations and claims arising under or by virtue of this order. Seller further agrees that the final invoice shall

> constitute not less than 10 percent (10%) of the total order price."

(Balicki Affidavit ¶ 3, 5; Sullivan Affidavit ¶ 2.)

3. In 1968, during the negotiations for A-595, which was the second of the 21 purchase orders entered into between G.E. and Curtiss-Wright, the negotiators for Curtiss-Wright sought to exclude from this purchase order a provision for the withholding of money until final payment. Although G.E. made some concessions on other matters during the negotiations for this purchase order, the provision for withholding was not excluded, and Curtiss-Wright agreed to its inclusion. As stated in Paragraph 2 above, a provision for withholding has been agreed to by Curtiss-Wright in each and every purchase order involved in this action, including those entered into subsequent to A-595. (Balicki Affidavit ¶ 5.)

4. With respect to the 12 purchase orders listed in Paragraph 1 above, Curtiss-Wright has submitted invoices requesting final payment from G.E. Each of the invoices was accompanied by a "qualified release" in which Curtiss-Wright purported to release G.E. and the Government from all claims except those which are the subject of this action. (Balicki Affidavit ¶ 7-9; Sullivan Affidavit ¶ ¶ 4, 6.)

5. In order for G.E. to make final payment to Curtiss-Wright under each of the purchase orders referred to in Paragraph 1 above, the Navy must approve a final amendment to the purchase order which establishes the final, firm fixed price. (Balicki Affidavit ¶ 6.)

6. On three occasions, representatives of G.E. have recommended to the Navy that it should consider allowing final payment to be made to Curtiss-Wright, when final payment is

otherwise appropriate, even though Curtiss-Wright is seeking payment while simultaneously attempting to reserve to itself the claims against G.E. and the Government which are the subject of this action. On each occasion, the Navy declined to agree to this recommendation. (Balicki Affidavit ¶ 11.)

7. On April 30, 1976, Curtiss-Wright filed the Complaint in this action naming G.E. as Defendant.

8. The Complaint in this action asserts "claims arising under or by virtue of" each of the purchase orders referred to in Paragraph 1 above.

Respectfully submitted,

COLE AND GRONER, P.C.

By: _____
ISAAC N. GRONER
WALTER H. FLEISCHER
WILLIAM A. KAHN
LEE A. SCHUTZMAN
ALFRED F. BELCUORE

1730 K Street, N.W.
Washington, D.C. 20006

HANNOCH, WEISMAN,
STERN & BESSER

By: _____
ALBERT G. BESSER

744 Broad Street
Newark, New Jersey 07102

Attorneys for Defendant
General Electric Company

Of Counsel:

ROLAND C. RADICE, ESQUIRE
MICHAEL A. LAMANNA, ESQUIRE
General Electric Company
One River Road
Schenectady, New York 12345

OPINION ON PARTIES' MOTIONS FOR SUMMARY JUDGMENT ON THE AMENDMENT TO AND SUPPLEMENTAL COMPLAINT, FILED DECEMBER 5, 1977

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 76-794

[TITLE OMITTED]

Appearances:

Messrs. Crummy, Del Deo, Dolan and Purcell
By: Mr. Ralph N. Del Deo
Attorneys for plaintiff

Messrs. Hannoch, Weisman, Stern and Besser
By: Mr. Albert G. Besser
Messrs. Cole and Groner
By: Mr. Isaac N. Groner (District of Columbia bar)
Attorneys for defendant

COOLAHAN, Senior District Judge

Plaintiff, Curtiss-Wright Corporation, and defendant, General Electric Company, a prime contractor of the United States Navy, entered into a series of 21 military procurement sub-contracts from 1968 to 1972 which called for Curtiss-Wright to produce, for delivery to the United States Navy, various components for use in nuclear submarines and surface vessels. On April 30, 1976, Curtiss-Wright filed a 16-count complaint in this court seeking damages and reformation with regard to these 21 subcontracts.[1] As permitted by order of this Court on

1. Plaintiff complains, *inter alia*, of misrepresentations by the defendant during negotiation and execution of the subcontracts and contractual breaches by the defendant during the course of plaintiff's performance.

Opinion Filed December 5, 1977

November 18, 1976, plaintiff filed an amendment to and supplemental complaint (adding counts 17 and 18) seeking, with regard to 12 of these subcontracts, the recovery of the sum of $8,378,536[2] representing the balance allegedly due for goods sold and delivered to defendant over and above the unliquidated damages sought in the original 16 counts of the complaint. It should be noted that there are also counterclaims involved in the instant lawsuit. Jurisdiction over this action exists pursuant to the diversity statute, 28 U.S.C. § 1332.

Curtiss-Wright has moved before this Court for an order granting partial summary judgment as to counts 17 and 18 of the amended complaint. General Electric also has moved for partial summary judgment in its favor as to these counts. The parties agree that the goods involved have already been manufactured and delivered by Curtiss-Wright.

As pointed out above, in the 17th and 18th counts of the amended complaint, plaintiff seeks to recover an $8,378,536 balance allegedly owed on 12 of the subcontracts between the parties. General Electric maintains that its continued withholding of that sum is justified under the subcontracts involved because a condition precedent to final payment has not been satisfied. The pertinent clause in the subcontracts reads:

> "Seller and each assignee under an assignment in effect at the time of final payment agree as a condition precedent to final payment, that the Buyer and the Government, their respective officers, agents and employees are released from all liabilities, obligations and

2. This figure represents approximately 10% of the aggregate prices set forth in the subcontracts. The remainder has already been paid to Curtiss-Wright by General Electric.

> claims arising under or by virtue of this order. Seller further agrees that the final invoice shall constitute not less than ten percent (10%) of the total order price."

It is the defendant's position that according to this clause, Curtiss-Wright must unqualifiedly release *all* claims against General Electric and the Government relating to the 12 subcontracts in question before it can recover the balance allegedly due under them. Since plaintiff has only offered a qualified release, excepting from the release those very claims it is asserting against defendant in this lawsuit, the defendant maintains that it is entitled to summary judgment on these counts of the complaint because this condition precedent to the right of plaintiff to receive final payment has not been satisfied. The plaintiff, on the other hand, believes that it is entitled to partial summary judgment on these counts, contending that the clause in question should be construed as having no application whatever in this context and thus should not be considered as a bar to plaintiff's right to recover the funds withheld thereunder.

The subcontracts between the parties contain provisions electing New York law as governing "in all respects." There is no reason why the parties' choice in this regard should not be honored. The pertinent New Jersey choice-of-law principles[3] indicate that the New Jersey courts, if faced with the issues presently before this Court, would honor the New York choice-of-law provisions included in these subcontracts since the applicable New York substantive law does not violate settled public policies of New Jersey and the transaction does bear a

3. Federal District Court jurisdiction over this case exists because of diversity of citizenship. Thus, New Jersey law must be applied, including New Jersey's choice-of-law rules. *Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 U.S. 487 (1941).

reasonable relationship to the State of New York.[4] N.J.S.A. 12A:1-105(1); *Farris Engineering Corporation v. Service Bureau Corporation*, 406 F.2d 519, 521 (3d Cir. 1969); *Congress Factors v. Malden Mills, Inc.*, 332 F. Supp. 1384, 1390 (D. N.J. 1971).

Plaintiff primarily relies on *Tufano Contracting Corp. v. Port of New York Authority*, 33 Misc. 2d 1028, 227 N.Y.S. 2d 707 (Sup. Ct. 1962), *aff'd*, 18 A.D. 2d 832, 237 N.Y.S. 2d 562 (2d Dept. 1963), *aff'd*, 13 N.Y. 2d 967, 244 N.Y.S. 2d 643, 194 N.E. 2d 603 (Ct. App. 1963), in support of its position. In that case, the plaintiff contractor had performed pursuant to a contract with the defendant Port of New York Authority and had thereafter commenced suit against the Authority for the payment of balances allegedly due under the construction contract, for compensation for extra work done thereunder, and for damages due to alleged contractual breaches by the defendant. The parties had included in their agreement a clause similar in language and effect to the clause involved in the instant case, and plaintiff similarly was moving for partial summary judgment on its claim for the balances due. The pertinent clause read:

> "The acceptance by the Contractor, or by anyone claiming by or through him, of the Final Payment shall be and shall operate as a release to the Authority of all claims and of all liability to the Contractor for all things done or furnished in connection with this Contract and for every act and neglect of the Authority and others relating to or arising out of this Contract, excepting only his claims for amounts withheld by the Authority

4. Both plaintiff and defendant have also agreed in their briefs that New York law is to govern.

> as hereinafter provided and for interest upon the Final Payment, if this payment is improperly delayed."

Tufano Contracting Corp., 227 N.Y.S. 2d at 708. In opposition to the motion, defendant argued:

> ". . . Judgment for plaintiff on its first cause of action could be given at this time only by ignoring the plain provisions of the contract in suit to the effect that acceptance by plaintiff of a final payment operates as a release to the Port Authority."

Tufano Contracting Corp., 227 N.Y.S. 2d at 708. This is substantially the same argument being made by General Electric in opposition to Curtiss-Wright's partial summary judgment motion and in support of its own motion for partial summary judgment.

The trial court in *Tufano* pointed out quite correctly that the release clause was valid and would be enforced if a contractor accepted final payment and thereafter attempted to assert claims under the same contracts. 227 N.Y.S. 2d at 708. *See also Brandt Corp. v. City of New York*, 14 N.Y. 2d 217, 250 N.Y.S. 2d 407, 199 N.E. 2d 493 (1964); *Buffalo Elec. Co. v. State*, 14 N.Y. 2d 453, 253 N.Y.S. 2d 537, 201 N.E. 2d 869 (1964). However, in *Tufano*, the contractor did not accept final payment, but instead filed suit asserting claims both for the final payments and for other contractual relief. The trial court stated that in so doing the "plaintiff did not contract away its right to sue for sums which it had earned," 227 N.Y.S. 2d at 708, and ultimately ruled:

> ". . . the release clause nowhere prescribes the time when judgment may be entered after such action is brought. Nor does the court consider judgment on the first cause of action to be final payment under the release clause of the contract."

227 N.Y.S. 2d at 708-709. Thus the court was of the opinion that summary judgment on the claim for the balances due did not constitute acceptance of "final payment" for purposes of the contractual provision that acceptance of final payment would operate as a release to the defendant.

The Supreme Court's decision in *Tufano* was affirmed by the Appellate Division and by the New York Court of Appeals. The Appellate Division agreed that plaintiff's acceptance of payment pursuant to the partial summary judgment ruling should not be deemed the equivalent of voluntary acceptance of final payment under the clause in question and thus would not result in the release of its other claims arising out of the contract. The Court of Appeals affirmed without opinion.

The pertinent contractual provision in the present case is strikingly similar to that involved in *Tufano*. It likewise provides that acceptance of final payment by Curtiss-Wright should operate to release General Electric and the Government from "all liabilities, obligations and claims arising under" the various contracts between the parties. According to *Tufano*, the contracts in question do not prescribe the time when judgment may be entered on a claim for the amount withheld after an action such as the present one has been instituted. 227 N.Y.S. 2d at 708-709. Thus the contractual clauses in question are not expressly applicable in the context of the instant motions for partial summary judgment. Therefore, payment to Curtiss-Wright of the balances due pursuant to an order of the Court

would not constitute "final payment" as to result in a release of General Electric and the Government from "all liabilities, obligations and claims arising under" the contract between Curtiss-Wright and General Electric.

The defendant has claimed that *Tufano* is not apposite and that instead *R.J. Marshall, Inc. v. Turner Construction Co.*, 139 N.Y.S. 2d 55 (Sup. Ct. 1955), represents the controlling authority under New York case law. In *R.J. Marshall,* a subcontractor had moved for partial summary judgment upon its first cause of action against a contractor for the alleged balance owing under a written contract. The contract in question specifically provided:

> ". . . Prior to final payment, the subcontractor shall execute and deliver to Turner (the contractor), a General Release in a form satisfactory to Turner, holding Turner and the Owner free and harmless from all claims arising out of, or in connection with, this contract."

139 N.Y.S. 2d at 57. The defendant, in opposition to the summary judgment motion, had alleged that a condition precedent to plaintiff's right to final payment had not been complied with, that being the execution by plaintiff to defendant of a general release as called for by the contract. The court ruled that plaintiff's contention that the condition precedent had been waived by defendant presented a question not properly the subject of summary disposition. The court also held that such a clause could preclude partial summary judgment and would be so enforced.

R.J. Marshall is distinguishable from both *Tufano Contracting Corp.* and the case *sub judice.* In *R.J. Marshall* the

parties had expressly provided for the performance of a specific act before the right to final payment was to accrue. In the present case and in *Tufano* the fact of final payment was fashioned by the contracts to operate as the release. The contracts between Curtiss-Wright and General Electric state that the parties "agree as a condition precedent for final payment, that the Buyer and the Government . . . are released." The fact of final payment was to result in a release of General Electric and the Government, the release being the condition attached to final payment. The pertinent clause in *Tufano* was similar in this respect. The contractual provision in *R.J. Marshall,* however, in requiring a written release before final payment was to become due, might be considered applicable in the context of partial summary judgment. In any event, the relevant contractual provision in the instant case is closer in language and effect to that involved in *Tufano* and thus should also not be considered applicable to the issues presently before this Court. *Tufano Contracting Corp.*, 227 N.Y.S. 2d at 708-709.

Alternatively, to the extent that *R.J. Marshall* may be deemed apposite, that is, to the extent that the contract presently before this Court more closely resembles that involved in *R.J. Marshall* than that in *Tufano,* this Court must now consider *R.J. Marshall* to have been repudiated by the subsequent decisions of the New York courts in *Tufano.*[5] *Tufano's* definition of "final payment" as not including an award by a court pursuant to an application for partial summary judgment must be regarded as also applicable in the *R.J. Marshall* situation as well. The *Tufano* case is the more recent of the two cases and was affirmed with opinion by the Appellate Division and affirmed without opinion by the New York Court of Appeals.

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5. The New York courts in *Tufano* did not refer to the opinion in *R.J. Marshall, Inc. v. Turner Construction Company.*

Opinion Filed December 5, 1977

Since New York law is to govern,[6] *Tufano* must be considered as the controlling authority in New York on the issues immediately before this Court.

For the foregoing reasons, the defendant is not justified in withholding final payment from the plaintiff at this time because of the "final payment" clause in the subcontracts between the parties. Furthermore, any acceptance by Curtiss-Wright of payment from General Electric pursuant to this Court's ruling will not operate to release General Electric and the Government from the other claims of plaintiff Curtiss-Wright which are presently the subject of this lawsuit. The parties in this action agree, and the New York case law is in accord, that the issue of interest due on any moneys withheld is not properly before the Court at this time. Therefore, the Court will not make any ruling on that issue. The parties are instructed to submit an appropriate order.

6. See pp. 3-4, *supra*.

ORDER DENYING PLAINTIFF'S MOTIONS TO STRIKE DEFENDANT'S SEVENTEENTH DEFENSE AND TO DISMISS DEFENDANT'S COUNTERCLAIM, FILED FEBRUARY 24, 1978

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 76-794

[TITLE OMITTED]

This matter having been opened to the Court upon Plaintiff's motion to dismiss the Counterclaim pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim upon which relief can be granted and to strike Defendant's 17th Affirmative Defense pursuant to Rule 12(f) of the Federal Rules of Civil Procedure, and the Court having considered the moving papers and briefs filed on behalf of the parties, and the Court having further considered the oral argument of counsel,

It is, on this 24th day of February, 1978,

ORDERED:

(1) That plaintiff's motion to dismiss the Counterclaim for failure to state a claim upon which relief can be granted be and the same is hereby denied, and the parties are left to their proofs as to whether Defendant gave adequate notice of the claims upon which it seeks to recover under the Counterclaim; and

(2) That Plaintiff's motion to strike the Seventeenth Affirmative Defense of set-off on the ground of failure to plead adequate notice be and the same is hereby denied, and the parties are left to their proofs as to whether Defendant gave

Order Filed February 24, 1978

adequate notice of the claim it seeks to set off under the Seventeenth Affirmative Defense.

s/ James A. Coolahan
James A. Coolahan
U.S. Senior District Judge

ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON THE AMENDMENT TO AND SUPPLEMENTAL COMPLAINT, GRANTING PLAINTIFF'S MOTION TO STRIKE DEFENDANT'S EIGHTEENTH AND NINETEENTH DEFENSES, DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT ON THE AMENDMENT TO AND SUPPLEMENTAL COMPLAINT, AND DEFERRING FOR LATER CONSIDERATION THE QUESTION OF PREJUDGMENT INTEREST, FILED FEBRUARY 24, 1978

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 76-794

[TITLE OMITTED]

This matter having been opened to the Court upon (1) Plaintiff's motion pursuant to Rule 12f of the Federal Rules of Civil Procedure to strike Defendant's Eighteenth and Nineteenth Affirmative Defenses, (2) Plaintiff's motion for partial summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, and (3) Defendant's cross-motion for partial summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, and this Court having considered the moving papers and briefs filed by the parties, and the Court having further considered the oral argument of counsel, and pursuant to this Court's opinion filed December 5, 1977,

It is, on this 24th day of February, 1978,

ORDERED:

1. That Plaintiff's motion to strike Defendant's Eighteenth Affirmative Defense be and the same is hereby granted;

2. That Plaintiff's motion to strike Defendant's Nineteenth Affirmative Defense be and the same is hereby granted;

3. That Plaintiff's motion for summary judgment on the Seventeenth Count of the Amendment to and Supplemental Complaint in the amount of $3,673,584.00 be and the same is hereby granted, and any acceptance by Plaintiff of payment from Defendant pursuant to this Order will not operate to release Defendant and the Government, their officers, agents and employees from (1) the other claims of Plaintiff that are presently the subject of this lawsuit, (2) any other claim of Plaintiff as to any contract not listed in paragraphs 127 and 132 of the Amendment to and Supplemental Complaint, and (3) any claim of Plaintiff for final payment under any contract which is not listed in paragraphs 127 and 132 of the Amendment to and Supplemental Complaint;

4. That Plaintiff's motion for summary judgment on the Eighteenth Count of the Amendment to and Supplemental Complaint in the amount of $4,704,952.00 be and the same is hereby granted, and any acceptance by Plaintiff of payment from Defendant pursuant to this Order will not operate to release Defendant and the Government, their officers, agents and employees from (1) the other claims of Plaintiff that are presently the subject of this lawsuit, (2) any other claim of Plaintiff as to any contract not listed in paragraphs 127 and 132 of the Amendment to and Supplemental Complaint, and (3) any claim of Plaintiff for final payment under any contract which is not listed in paragraphs 127 and 132 of the Amendment to and Supplemental Complaint;

5. That Defendant's motion for summary judgment on the Seventeenth Count of the Amendment to and Supplemental Complaint be and the same is hereby denied;

6. That Defendant's motion for summary judgment on the Eighteenth Count of the Amendment to and Supplemental Complaint be and the same is hereby denied; and

7. That the question of prejudgment interest is hereby deferred for later consideration by this Court.

s/ James A. Coolahan
James A. Coolahan
U.S. Senior District Judge

LETTER OPINION ON PLAINTIFF'S REQUEST FOR RULE 54(b) CERTIFICATION, FILED FEBRUARY 24, 1978

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
NEWARK, N.J. 07102

Chambers of
JAMES A. COOLAHAN
SR. JUDGE

February 24, 1978

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Gentlemen:

Curtiss-Wright Corp. v. General Electric Co.
Civil Action No. 76-794

Plaintiff, Curtiss-Wright Corporation, has requested Rule 54(b) certification of this Court's ruling of December 5, 1977 as to Counts 17 and 18 of plaintiff's Amendment to and Supplemental Complaint. However, such certification cannot be granted since the claims involved have not been *finally*

adjudicated within the meaning of Rule 54(b). The matter of pre-judgment interest has not yet been resolved. *See Cinerama, Inc. v. Sweet Music, S.A.*, 482 F.2d 66 (2d Cir. 1973).

Furthermore, it would not be proper for this Court to decide at this time whether Rule 54(b) certification should be granted upon resolution of the pre-judgment interest issue. The weighing process which must be undertaken by a District Court in exercising its discretion under Rule 54(b) should not be attempted before the claims involved have themselves been finally adjudicated. After the resolution of the pre-judgment interest question, the Court will promptly exercise its Rule 54(b) discretion.

Accordingly, on this date, I have signed orders which reflect rulings made in this case from the bench on September 26, 1977 and by opinion filed December 5, 1977.

s/ James A. Coolahan
James A. Coolahan
U.S. Senior District Judge

Original filed with
Clerk of the Court

OPINION ON PLAINTIFF'S MOTION FOR AN AWARD OF PREJUDGMENT INTEREST, FILED JUNE 20, 1978

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 76-794

[TITLE OMITTED]

Appearances:

Messrs. Crummy, Del Deo, Dolan and Purcell
By: Mr. Ralph N. Del Deo
Attorneys for plaintiff

Messrs. Hannoch, Weisman, Stern and Besser
By: Mr. Albert G. Besser
Messrs. Cole and Groner
By: Mr. Isaac N. Groner (District of Columbia bar)
Attorneys for defendant

COOLAHAN, Senior District Judge

The facts of this case were adequately set forth in the opinion filed December 5, 1977. In that opinion, I decided that plaintiff was entitled to partial summary judgment on counts 17 and 18 of its Amendment to and Supplemental Complaint in the amounts of $3,673,584 and $4,704,952 respectively. I signed an order to that effect on February 24, 1978. By letter opinion of February 24, 1978, I also determined that Fed. R. Civ. P. 54(b) certification of that judgment as "final" would not be proper because the matter of prejudgment interest on the awarded sums had not yet been resolved. Consequently, plaintiff Curtiss-Wright has now moved this Court for an award of prejudgment interest upon counts 17 and 18 of the Amendment to and Supplemental Complaint.

Opinion Filed June 20, 1978

The Applicable Law

The contracts between the parties contain provisions electing New York law as governing "in all respects." As explained in the opinion of December 5, 1977, there is no reason why the parties' choice in this regard should not be honored. In this context, the issue of prejudgment interest is necessarily an element of the measure of damages to be awarded for breach of contract. Under generally accepted conflict-of-laws principles, issues as to the measure of damages and prejudgment interest are governed by the local law of the State whose law has been selected for other purposes by the parties in a choice-of-law clause. *Restatement (Second), Conflict of Laws* §§187, 207 (1971). Thus, New York law will govern as to plaintiff's entitlement to prejudgment interest.

Plaintiff's Entitlement to Prejudgment Interest

The major issue which must be resolved is the effect of a clause in the contracts which provides that final payment results in or is conditioned upon a release of all further claims. This question has been squarely resolved by the Appellate Division of the New York Supreme Court in plaintiff's favor. In *Byrne Construction Company v. New York State Thruway Authority,* 19 A.D. 2d 192, 241 N.Y.S. 2d 58 (App. Div.), *leave to appeal denied,* 13 N.Y. 2d 598, 244 N.Y.S. 2d 1025, 194 N.E. 2d 605 (1963), the Appellate Division of the New York Supreme Court awarded prejudgment interest to a similarly situated claimant. As in the instant case, the contract involved in *Byrne* contained a "final payment-release" clause which provided that final payment resulted in or was conditioned upon a release of all further claims. The *Byrne* court held that the clause did not bar an award of prejudgment interest upon the undisputed balance of the contract price and, furthermore, that the clause did not condition the entitlement to interest upon the claimant's

successful prosecution of its remaining claims, a position asserted unsuccessfully by both the defendant in *Byrne* and by General Electric herein.

Defendant General Electric relies on a line of later New York decisions in support of its position that plaintiff cannot recover for prejudgment interest or can only recover prejudgment interest if it prevails on its other causes of action. Defendant cites *Yonkers Contracting Company v. New York State Thruway Authority,* 25 N.Y. 2d 1, 302 N.Y.S. 2d 521, 250 N.E. 2d 27 (1969), and *Terry Contracting, Inc. v. State of New York,* 23 N.Y. 2d 167, 295 N.Y.S. 2d 897, 243 N.E. 2d 125 (1968) (both of which were founded upon *William Higgins & Sons, Inc. v. State of New York,* 20 N.Y. 2d 425, 284 N.Y.S. 2d 697, 231 N.E. 2d 285 (1967)). This reliance, however, is misplaced. In all of the above cases, the applicable contracts contained not only "final payment-release" clauses of the type involved in *Byrne* and the instant case, but also contained contractual provisions which provided that rejection of a tender of final payment by the claimant constituted a waiver of any claim to prejudgment interest upon the tendered amount. It is vital to note that the Appellate Division of the New York Supreme Court in *Byrne* also expressly recognized this difference in contractual language in distinguishing a New York Court of Appeals case which contained a "rejection of tender-waiver of interest" clause:

> "The State maintains that the recent decision of the Court of Appeals in *Wood v. State,* 12 N.Y. 2d 25, 234 N.Y.S. 2d 204, 186 N.E. 2d 406 approved and adopted the State's theory that the right to interest depends upon the outcome of the extra work claim. An examination of the record and briefs in the Court of Appeals in the *Wood* case demonstrates that the State's assertion with respect to its holding is incorrect. The decision in

> the *Wood* case turned upon a clause in the contract there in suit (following the clause that acceptance of final payment would operate as a release of all claims) reading: 'Should the Contractor refuse to accept the final payment as tendered by the Comptroller, it shall constitute a waiver of interest thereon.' This is the clause referred to in the Court of Appeals opinion (12 N.Y. 2d p. 29, 234 N.Y.S. 2d p. 206, 186 N.E. 2d p. 408) in the statement that 'by the terms of the contract, claimant is not entitled to interest on the tendered amount,' the court noting that the State had 'tendered to claimant the amount due under the contract.' There is no provision such as that contained in the *Wood* contract in the contract involved in this case.
>
> . . . . .
>
> In a case in which a clause like that in the *Wood* contract is not present, we must apply the general principle that, in order to stop the running of interest on an undisputed obligation, a tender of payment must be unconditional. . . . The tender in this case was not an unconditional one but was conditioned upon a release of all claims including extra work claims. The claimant was justified in rejecting the tender and in suing in the Court of Claims both for the unpaid contract balance and for the extra work claim it had made in good faith. It is therefore entitled to interest upon the contract balance for the period from the date of the acceptance of the work to the date of the payment of the judgment against the Thruway. Authority."

Byrne, supra, 241 N.Y.S. 2d at 61-62.

Thus, *Byrne* necessarily stands for the proposition that where the contract only contains a "final payment-release" clause and does not contain a "rejection of tender-waiver of interest" clause, the plaintiff is entitled to prejudgment interest on the uncontested claims regardless of the outcome of its remaining claims. Although the treatment accorded to the "rejection of tender-waiver of interest" clause at the time of *Byrne* may seem to differ from that adopted in the later cases of *Yonkers, supra, Terry, supra,* and *Higgins, supra,*[1] the distinction in contractual language recognized in *Byrne* nevertheless remains valid.

Defendant argues that the "rejection of tender-waiver of interest" clauses cannot explain why recovery of interest was conditioned on the success of the remaining claims in *Yonkers, Terry,* and *Higgins.* Defendant contends that in those cases it was held that the "rejection of tender-waiver of interest" clauses were waived and of no further effect after the defendants therein consented to severance of the claims for the undisputed balances and agreed to postponement of the decisions on the prejudgment interest issues. This, however, would be inconsistent with the holding in *Byrne, supra.*[2] It would be more accurate to say that the consent to severance and postponement of the decision on the prejudgment interest issue was deemed to be a waiver by the

1. It is not altogether clear that the construction of the "rejection of tender-waiver of interest" clause has changed since *Wood v. State, supra,* was decided (discussed in the *Byrne* excerpt). The holding in *Wood* has not been overturned by the New York Court of Appeals but was distinguished by that court in *William Higgins & Sons, Inc. v. State of New York, supra.*

2. Without the "rejection of tender-waiver of interest" clauses, the contractual language in *Yonkers* and *Byrne* would be nearly identical. Yet the courts in *Yonkers* and *Byrne* reached different conclusions on the prejudgment interest issue.

defendants of *strict enforcement*[3] of the "rejection of tender-waiver of interest" clauses and that the effect of the clauses was modified to preclude recovery of interest only if the claims which the plaintiffs sought to retain by rejecting the tender of payment were proven not to be meritorious.

Thus, in accordance with the clear holding of the Appellate Division of the New York Supreme Court in *Byrne, supra,* plaintiff is entitled to prejudgment interest. This declaration of New York law and policy made by a New York court as to the construction to be given to these "final payment-release" clauses cannot be disturbed by this Court in the exercise of its diversity jurisdiction.

When Interest Begins to Run

New York Civ. Prac. Law & R. §5001 provides that prejudgment interest begins to run as of the earliest date that the cause of action existed. This date would necessarily be that date, according to the contracts, when the final payments were due.

The parties agreed at oral argument as to the dates from which prejudgment interest would run in the event that the Court finds that plaintiff is, in fact, entitled to prejudgment interest. Therefore, the applicable dates from which prejudgment interest will run for each of the 12 purchase orders enumerated in counts 17 and 18 of the Amendment to and Supplemental Complaint are:

3. Strict enforcement would preclude the recovery of interest regardless of the validity of the remaining claims.

Opinion Filed June 20, 1978

Purchase Order	Date Interest Begins to Run
B-425	November 30, 1975
B-384	November 30, 1975
B-410	December 5, 1975
B-442	June 18, 1976
B-433	June 18, 1976
B-423	June 18, 1976
A-550	July 20, 1977
A-595	January 9, 1978
A-642	June 18, 1976
B-429	October 30, 1976
B-382	November 30, 1975
B-412	November 30, 1975

The Rate of Interest

Because of the choice-of-law clauses appearing in the parties' contracts, New York law governs the issue of prejudgment interest in this case, including the applicable rate. *Restatement (Second), Conflict of Laws* §207, Comment e (1971). Under New York law, the rate of prejudgment interest is fixed by statute at six percent per annum. N.Y. Civ. Prac. Law & R. §5004. Thus, the rate of interest to be awarded plaintiff must be six percent. Although plaintiff maintains for various reasons that the rate should be other than as set forth above, the equitable factors presented do not give rise to a sufficiently strong public policy of this State, under the applicable conflict-of-laws principles, to warrant overriding the parties' contractual choice in this regard.

Opinion Filed June 20, 1978

Conclusion

In conclusion, I find that plaintiff is entitled to prejudgment interest at the rate of 6% per annum on those subcontracts enumerated in counts 17 and 18 of the Amendment to and Supplemental Complaint from those dates set forth herein.

The parties are instructed to submit an appropriate order.

FOURTH SUPPLEMENTAL AFFIDAVIT OF JAMES H. SULLIVAN, FILED JULY 21, 1978 WITH ATTACHMENTS

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 76-794

(Hon. James A. Coolahan)

[TITLE OMITTED]

STATE OF NEW JERSEY :
: ss.
COUNTY OF BERGEN :

I, JAMES H. SULLIVAN, of full age, being duly sworn according to law, upon my oath depose and day:

1. I am employed as General Manager - Nuclear Facility by Curtiss-Wright Corporation (hereinafter "Curtiss-Wright"), plaintiff in the above captioned matter. In this action, I have previously submitted Affidavits dated May 2, 1977, January 19, 1978, March 21, 1978, and May 17, 1978. I submit this Fourth Supplemental Affidavit in support of plaintiff's motion for summary judgment with prejudgment interest on Count 19 of the Additional Supplemental Complaint in this action.

2. The records of Curtiss-Wright reflect that between May 29, 1969, and September 29, 1972, Curtiss-Wright entered into 9 subcontracts with the General Electric Company (hereinafter "General Electric"), defendant in the above captioned matter, pursuant to which Curtiss-Wright agreed to supply a total of 94 large components for use in nuclear propulsion systems of naval vessels. These 9 subcontracts are designated as Purchase Order Nos.: B-451, B-452, B-458, A-641, A-661, A-656, A-675, B-478, and A-113 (hereinafter "the 9 Purchase Orders").

Fourth Supplemental Affidavit

3. Curtiss-Wright has made delivery of each of the large components called for by the 9 Purchase Orders and has otherwise performed all of the terms and conditions of said Purchase Orders which were to be performed by it.

4. Curtiss-Wright has submitted to General Electric the final invoices for each of the 9 Purchase Orders. Each invoice was accompanied by a qualified release, a sample of which has been attached hereto as "Exhibit B".

5. As of this date, General Electric has failed to make final payment under each of the 9 Purchase Orders.

6. Attached to this Affidavit as "Exhibit A" is a "Schedule of Liquidated Claims" which sets forth, as to each of the 9 Purchase Orders, (a) a description of the components involved, (b) the date of the original Purchase Order, (c) date of contract completion, (d) the date Curtiss-Wright's final cost data was submitted to the Defense Contract Auditing Agency of the United States Department of Defense (DCAA), (e) the date of DCAA audit was issued, (f) the date the final invoice was submitted, and (g) the total value, exclusive of interest, of the final payment due Curtiss-Wright.

7. Based on the position taken by General Electric with regard to the 12 Purchase Orders which are the subject of the 17th and 18th Counts of the Amendment To And Supplemental Complaint in this action (see Paragraph 10 of my Affidavit in this action dated May 2, 1977), it would appear that General Electric has not made final payment under the 9 Purchase Orders due to the dispute as to Curtiss-Wright's position that it could submit qualified releases at the time of final invoicing. (Although final payment under Purchase Order A-113 is not due until August 10, 1978, based on the foregoing, I have no reason to believe that General Electric will tender final payment at that

time). As of this date, I am unaware of any dispute between General Electric and Curtiss-Wright as to the amount due Curtiss-Wright as final payment under the 9 Purchase Orders.

8. The total amount of the final payments due Curtiss-Wright on the 9 Purchase Orders is $10,535,881.00, exclusive of interest.

9. Each of the 9 Purchase Orders provides as the "Terms of Payment" that payment shall be made "Net 30 days" from the date on which demand for payment is made. None of the 9 Purchase Orders makes any provision for a waiver of interest by Curtiss-Wright.

s/ James H. Sullivan
JAMES H. SULLIVAN

Sworn to July 17th, 1978.

EXHIBIT A — SCHEDULE OF LIQUIDATED CLAIMS

P.O. No.	Description	Original P.O. Date	Date Contract Completed	Date Final Cost Data Submitted	Date DCAA Audit Issued	Date Invoice Submitted	$ Value of Final Payment Excluding Interest
B-451	(2) S6G Pressurizers	2/26/71	11/25/75	5/3/76	12/14/76	12/22/76	$ 292,564.00
B-452	(10) S6G Steam Generators	3/6/71	7/16/76	9/27/76	12/1/76	12/16/76	2,543,025.00
B-428	(6) D2G Pressurizers	3/5/70	5/25/76	10/7/76	11/10/76	12/22/76	496,519.00
A-641	(2) D2G Vessels, Heads, Shields	5/29/69	1/25/78	12/23/76	1/18/77	2/3/77	553,506.00
A-656	(5) S6G Vessels, Heads, Shields	11/11/69	3/11/77	1/7/77	2/1/77	4/13/77	1,436,148.00
A-661	(4) D2G Vessels, Heads, Shields	3/4/70	6/19/78	1/7/77	1/24/77	10/31/77	1,144,786.00
A-675	(6) S6G Vessels, Heads, Shields	9/30/70	3/10/78	11/10/77	2/3/78	2/9/78	1,831,466.00
B-478	(10) S6G Steam Generators	9/29/72	10/4/77	2/28/78	5/1/78	4/28/78	1,370,817.00
A-113	(5) S6G Vessels, Heads, Shields	9/29/72	6/29/78	2/28/78	5/11/78	7/11/78	867,050.00
						Total	$10,535,881.00

Fourth Supplemental Affidavit

EXHIBIT B

CURTISS-WRIGHT CORPORATION

One Passaic Street, Wood-Ridge, New Jersey 07075

C-WC Ref. No. A-78-9

General Electric Company
Machinery Apparatus Operation
Post Office Box 1021
Schenectady, New York 12301

Attention: Mr. W. Northrop

Subject: GE/MAO-C-WC Contracts — Final Payment

Dear Mr. Northrop:

Pursuant to the terms of Purchase Order No. A-113 and in consideration of the sum of Eight Hundred Sixty Seven Thousand and Fifty Dollars ($867,050), which has been or is to be paid under the said Purchase Order to Curtiss-Wright Corporation, One Passaic Street, Wood-Ridge, New Jersey, Curtiss-Wright Corporation, upon payment of the said sum by General Electric Company, does remise, release and discharge General Electric Company and the Government, their officers, agents and employees, of and from all liabilities, obligations, claims and demands whatsoever under or arising from the said Purchase Order, except such claims as are set forth in a certain civil action entitled Curtiss-Wright Corporation, Plaintiff, versus General Electric Company, Defendant, File No. 76-794, pending in the United States District Court for the District of New Jersey.

Fourth Supplemental Affidavit

IN WITNESS WHEREOF, this Release has been executed this *eleventh* day of *July*, 1978.

CURTISS-WRIGHT CORPORATION

s/ Richard P. Sprigle
Richard P. Sprigle
Senior Vice President

CERTIFICATE

I, Francis E. Fallon, certify that I am the Secretary of Curtiss-Wright Corporation named in the foregoing Release; that Richard P. Sprigle who signed said Release on behalf of Curtiss-Wright Corporation, is the Senior Vice President of said Corporation; that said Release was duly signed for and in behalf of said Corporation by authority of its governing body and is within the scope of its corporate powers.

s/ Francis E. Fallon
Francis E. Fallon

Corporate Seal

ORDER GRANTING PLAINTIFF'S MOTION FOR AN AWARD OF PREJUDGMENT INTEREST ON THE AMENDMENT TO AND SUPPLEMENTAL COMPLAINT, FILED JULY 27, 1978

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 76-794

(Hon. James A. Coolahan)

[TITLE OMITTED]

This matter having been opened to the Court upon the motion of plaintiff, Curtiss-Wright Corporation, for an award of prejudgment interest on Counts 17 and 18 of the Amendment To And Supplemental Complaint, this Court having entered an Order on February 24, 1978 granting plaintiff's motion for partial summary judgment on said Counts, and the Court having considered the moving papers and briefs submitted by the parties, and the Court having further considered the oral argument of counsel, and good and sufficient cause having been shown, for the reasons set forth in this Court's opinion filed June 20, 1978,

It is on this 27th day of July, 1978,

ORDERED, that plaintiff, Curtiss-Wright Corporation's motion for an award of prejudgment interest on Counts 17 and 18 of the Amendment To And Supplemental Complaint be and the same is hereby granted, and it is further

ORDERED, that prejudgment simple interest at the rate of six percent per annum shall run from the following dates with respect to each of the 12 purchase orders enumerated in Counts 17 and 18 of the Amendment To And Supplemental Complaint:

Order Filed July 27, 1978

Purchase Order	Date Interest Begins To Run
B-425	November 30, 1975
B-384	November 30, 1975
B-410	December 5, 1975
B-442	June 18, 1976
B-433	June 18, 1976
B-423	June 18, 1976
A-550	July 20, 1977
A-595	January 9, 1978
A-642	June 18, 1976
B-429	October 30, 1976
B-382	November 30, 1975
B-412	November 30, 1975

s/ James A. Coolahan
JAMES A. COOLAHAN
U.S. Senior District Judge

LETTER OPINION DIRECTING THAT FINAL JUDGMENT BE ENTERED UNDER RULE 54(b) ON THE COURT'S PRIOR ORDERS AWARDING PLAINTIFF SUMMARY JUDGMENT WITH PREJUDGMENT INTEREST ON THE AMENDMENT TO AND SUPPLEMENTAL COMPLAINT, FILED JULY 27, 1978

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
NEWARK, N.J. 07102

Chambers of
JAMES A. COOLAHAN
SR. JUDGE

July 27, 1978

Ralph N. Del Deo, Esq.
Crummy, Del Deo, Dolan & Purcell
Gateway 1
Newark, N.J. 07102

Albert G. Besser, Esq.
Hannoch, Weisman, Stern & Besser
744 Broad Street
Newark, N.J. 07102

Isaac N. Groner, Esq.
Cole & Groner
1730 K Street, N.W.
Washington, D.C. 20006

Gentlemen:

Curtiss-Wright Corp. v. General Electric Co.
Civil Action No. 76-794

Letter Opinion Filed July 27, 1978

Plaintiff, Curtiss-Wright Corporation, has moved for Rule 54(b) certification of this Court's orders of February 24, 1978, and July 27, 1978, which granted to plaintiff summary judgment and prejudgment interest upon counts 17 and 18 of the Amendment to and Supplemental Complaint. Plaintiff's prior motion for Rule 54(b) certification of the order of February 24, 1978, alone was denied by Letter Opinion of February 24, 1978, because at that time the matter of prejudgment interest had not yet been resolved. *See Cinerama, Inc. v. Sweet Music, S.A.*, 482 F.2d 66 (2d Cir. 1973).

It is clear that Rule 54(b) certification is not to be granted as a matter of course and that this remedy should be reserved for the infrequent harsh case because of the overload which would otherwise result in the federal appellate courts. Furthermore, it is also well established that the considerations which are involved in a grant of summary judgment are not the same considerations relevant to an order of final certification under Rule 54(b). The essential inquiry is whether, after balancing the competing factors, finality of judgment should be ordered to advance the interests of sound judicial administration and justice to the litigants. *Allis-Chalmers Corp. v. Philadelphia Electric Co.*, 521 F.2d 360 (3d Cir. 1975).

In the instant case, certification of the above orders could not, in any way, result in unnecessary appellate review. The claims which have been finally adjudicated are separate, distinct, and independent of any of the other claims or counterclaims involved in this lawsuit. Plaintiff's other claims generally seek recovery for alleged cost overruns and lost profits, and defendant's counterclaims generally seek to recover for the costs of alleged technical assistance provided by the defendant to the plaintiff. For this reason, certification should not prevent the rest of this case from being prepared for trial. Also, because of the above, the need for review will not be mooted by any future developments in the District Court. The determinations by the

Letter Opinion Filed July 27, 1978

District Court regarding the claims sought to be certified under Rule 54(b) are final and will not be changed by later developments in the District Court. Furthermore, because of the nature of the claims which are involved, the appellate courts will not need to decide the same issues more than once even if two appeals arise out of this case.

Justice to the litigants will also be advanced by certifying the above orders. Plaintiff has sustained, and will continue to sustain, losses due to delay in payment of the sums which are owed. Plaintiff will only be entitled to prejudgment simple interest at the rate of six percent per annum pursuant to this Court's order of July 27, 1978, and, because of modern interest rates, will suffer daily financial losses from nonpayment of these liquidated debts. *United Bank of Pueblo v. Hartford Accident & Indemnity Co.*, 529 F.2d 490 (10th Cir. 1976). Since several millions of dollars are owed by the defendant, great injustice would result from further delay. In fact, because of the complex nature of the remaining claims in this case, the delay in payment which would occur if certification is denied would span many months, if not years.

The solvency of the parties is not a factor weighing heavily either against or in favor of Rule 54(b) certification under the circumstances of this case. Both the plaintiff and the defendant appear to be financially sound. Therefore, plaintiff's financial condition is such that it would be able to await the payment of these sums, and defendant's economic status is such that defendant will be able to satisfy the judgment whenever final judgment is entered. However, it is likewise true that defendant is able to pay now without awaiting the adjudication of its counterclaims for use as a possible setoff, and that plaintiff will be able to satisfy a judgment in favor of defendant on the counterclaims whenever such judgment is entered.

Letter Opinion Filed July 27, 1978

Although the presence of defendant's counterclaims and the consequent possibility of a setoff recovery are factors weighing against certification, the Court is of the opinion that such is outweighed in this case by considerations favoring Rule 54(b) certification. After balancing all of the factors as outlined above, it appears that there is no just reason for delay and that final judgment should be entered under Rule 54(b) encompassing the orders of February 24, 1978, and July 27, 1978. Accordingly, on this date, I have signed an order to this effect.

s/ James A. Coolahan
James A. Coolahan
U.S. Senior District Judge

Original filed with
Clerk of the Court

ORDER OF FINAL JUDGMENT, ENTERED JULY 28, 1978

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 76-794

[TITLE OMITTED]

This matter having been opened to the Court upon the motion of plaintiff, Curtiss-Wright Corporation, for an order granting Rule 54(b) certification of this Court's orders of February 24, 1978, and July 27, 1978, which awarded to plaintiff summary judgment and prejudgment interest upon counts 17 and 18 of the Amendment to and Supplemental Complaint, and the Court having considered the moving papers and briefs submitted by the parties, and good and sufficient cause having been shown, for the reasons set forth in this Court's letter opinion filed this day,

It is, on this 27th day of July, 1978,

ORDERED that final judgment be entered under Rule 54(b) encompassing the orders of February 24, 1978, and July 27, 1978, there being no just reason for delay.

s/ James A. Coolahan
U.S.D.J.

NOTICE OF APPEAL FROM ORDER OF FINAL JUDGMENT ENTERED JULY 28, 1978

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 76-794

(Hon. James A. Coolahan)

[TITLE OMITTED]

Defendant General Electric Company hereby appeals to the United States Court of Appeals for the Third Circuit from the Order of final judgment entered July 28, 1978, and the interlocutory Orders dated February 24, 1978, and July 27, 1978, subsumed therein.

COLE AND GRONER, P.C.

By Isaac N. Groner
ISAAC N. GRONER
WALTER H. FLEISCHER
ALFRED F. BELCUORE

1730 K Street, N.W.
Washington, D.C. 20006
Telephone: (202) 331-8888

HANNOCH, WEISMAN, STERN
& BESSER

By Albert G. Besser
ALBERT G. BESSER

Notice of Appeal Entered July 28, 1978

744 Broad Street
Newark, New Jersey 07102
Telephone: (201) 621-8800

Attorneys for Defendant
General Electric Company

Dated: August 3, 1978

Clerk please serve:

Ralph N. Del Deo, Esquire
Crummy, Del Deo, Dolan & Purcell
Gateway I
Newark, New Jersey 07102

Attorneys for Plaintiff
Curtiss-Wright Corporation

ORDER GRANTING DEFENDANT'S APPLICATION FOR STAY OF JUDGMENT, FILED AUGUST 3, 1978

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 76-794

(Hon. James A. Coolahan)

[TITLE OMITTED]

This matter having come before the Court on the Application of Defendant General Electric Company for Stay of Judgment Without Bond, and the Court having considered the papers submitted by the parties and heard the argument of counsel, and Defendant having shown that its financial position is sufficient to secure this judgment while Defendant pursues its appeal, it is on this 3rd day of August, 1978,

ORDERED, that the Court finds and approves that the financial position of Defendant General Electric Company is sufficient to provide unquestionable security for Plaintiff; and it is

FURTHER ORDERED, that no bond need be given by Defendant General Electric Company to secure this judgment pending this appeal; and it is

FURTHER ORDERED, that this Court's Order of final judgment entered July 28, 1978, and the interlocutory Orders dated February 24, 1978, and July 27, 1978, subsumed therein, be, and the same hereby are, stayed until final resolution of the appeal therefrom by the Defendant General Electric Company to the United States Court of Appeals for the Third Circuit.

s/ James A. Coolahan
JAMES A. COOLAHAN
SENIOR UNITED STATES
DISTRICT JUDGE

SUPPLEMENTAL AFFIDAVIT OF E.A. KLEIN, FILED AUGUST 22, 1978

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 76-794

(Hon. James A. Coolahan)

[TITLE OMITTED]

STATE OF NEW YORK)
) SS:
COUNTY OF SCHENECTADY)

E.A. KLEIN, being duly sworn, deposes and states:

1. I am the Manager of Procurement Operations of the Machinery Apparatus Operation ("M.A.O.") of Defendant General Electric Company ("G.E."). I have previously submitted an Affidavit in this action dated April 14, 1978. I submit this Supplemental Affidavit in support of G.E.'s Motion for Summary Judgment on Count 19 of the Additional Supplemental Complaint of Plaintiff Curtiss-Wright Corporation ("Curtiss-Wright") and in opposition to Curtiss-Wright's Motion for Summary Judgment with Prejudgment Interest on Count 19 of the Additional Supplemental Complaint.

2. Each of the nine purchase orders that are the subject of Count 19 of Curtiss-Wright's Additional Supplemental Complaint contains the following two clauses:

> "[N]o payment by Buyer [G.E.] shall be due until thirty (30) days after (1) receipt of an acceptable invoice and appropriate evidence that Seller

[Curtiss-Wright] has met all requirements of the order, or (2) receipt of the supplies at destination, whichever last occurs." Terms and Conditions of Purchase, Article 5a.

"Seller [Curtiss-Wright] and each assignee under an assignment in effect at the time of final payment agree as a condition precedent to final payment, that the Buyer and the Government, their respective officers, agents and employees are released from all liabilities, obligations and claims arising under or by virtue of this order. Seller further agrees that the final invoice shall constitute no less than ten percent (10%) of the total order price." Terms and Conditions of Purchase, Article 5c.

3. Each of these nine purchase orders, as well as each of the 12 purchase orders, with the exception of B-429, that are the subject of Counts 17 and 18 of Curtiss-Wright's Amendment To And Supplemental Complaint, contains the following standard form final invoicing instructions:

> "The final invoice(s) shall be marked 'FINAL' on the face of the invoice to signify billing is complete under this Order and that all claims on this Order against General Electric Company M.A.O. and/or the Government have been resolved."

4. As Mr. Sullivan stated in his Fourth Supplemental Affidavit dated July 17, 1978 (Paragraph 4), each final invoice submitted by Curtiss-Wright for these nine purchase orders was accompanied by a qualified release purporting to release G.E. and the Government from all claims except those which are the

subject of this action. Curtiss-Wright has never submitted an "acceptable invoice" for these nine purchase orders.

5. Subsequent to the filing of Mr. Sullivan's Fourth Supplemental Affidavit, I discussed with Mr. Sullivan the dates on which final payment to Curtiss-Wright would have been due if Curtiss-Wright had complied with Articles 5a and 5c and had submitted an acceptable invoice. We agreed that final payment on the nine purchase orders that are the subject of Count 19 of Curtiss-Wright's Additional Supplemental Complaint would have been due, in the amounts indicated, on the following dates, had Curtiss-Wright not attempted to qualify its release of G.E. and the Government while seeking final payment:

Purchase Order	Date Payment Due	Amount of Final Payment
B-451	January 26, 1977	$ 292,564
B-452	January 19, 1977	2,543,020
B-428	January 26, 1977	496,519
A-641	May 15, 1978	553,506
A-656	May 21, 1977	1,436,144
A-661	July 19, 1978	1,144,786
A-675	May 15, 1978	1,831,466
B-478	June 2, 1978	1,370,817
A-113	August 14, 1978	867,050

6. Therefore, in accordance with this Court's Opinions of December 5, 1977, and June 20, 1978, the total final payment due Curtiss-Wright on the nine purchase orders that are the subject of Count 19 of the Additional Supplemental Complaint is $10,535,872, with simple prejudgment interest at six percent per annum to be calculated with respect to each purchase order from the dates specified above.

s/ E.A. Klein
E.A. KLEIN

Sworn to August 21st, 1978.

ADDITIONAL SUPPLEMENTAL COMPLAINT FILED AUGUST 28, 1978

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

(Hon. James A. Coolahan)

Civil Action No. 76-794

[TITLE OMITTED]

Plaintiff, for its Additional Supplemental Complaint, alleges as follows:

NINETEENTH COUNT

135. Plaintiff repeats and realleges all of the allegations contained in Paragraphs 1 through 7 of the Complaint in this action as if set forth at length herein.

136. From on or about early in 1968 through 1972, on various occasions, plaintiff and defendant entered into a series of 21 contracts pursuant to which plaintiff entered into the business of manufacturing nuclear components and performing related work for the defendant, for the aggregate sum of $214,600,000.00 which defendant agreed to pay plaintiff.

137. To date, plaintiff has performed all of the terms and conditions of those contracts designated as Purchase Order Nos. B-451, B-452, B-428, A-641, A-656, A-661, A-675, B-478, and A-113 on its part to be performed.

138. The balance due on account of the price stipulated in said Purchase Orders, after crediting all progress payments made, is the sum of $10,535,872.00 over and above such unliquidated additional amounts as may be found to be due

plaintiff thereon under the foregoing Counts of the Complaint in this action.

139. Defendant has not paid said sum of $10,535,872.00 to plaintiff or any part thereof, although demand therefor has been made.

WHEREFORE, plaintiff demands judgment against defendant on this Count for the sum of $10,535,872.00, interest and costs.

CRUMMY, DEL DEO, DOLAN
& PURCELL
Attorneys for Plaintiff

s/ Ralph N. Del Deo
Ralph N. Del Deo

Date: August 28, 1978.

ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT WITH PREJUDGMENT INTEREST ON THE ADDITIONAL SUPPLEMENTAL COMPLAINT, AND DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT ON THE ADDITIONAL SUPPLEMENTAL COMPLAINT, FILED AUGUST 29, 1978

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

(Hon. James A. Coolahan)

Civil Action No. 76-794

[TITLE OMITTED]

This matter having been opened to the Court upon (1) plaintiff's motion pursuant to Rule 15(d) of the Federal Rules of Civil Procedure to file an Additional Supplemental Complaint (19th Count), (2) plaintiff's motion pursuant to Rule 56 of the Federal Rules of Civil Procedure for summary judgment with prejudgment interest on the 19th Count of the Additional Supplemental Complaint, (3) defendant's cross-motion pursuant to Rule 56 of the Federal Rules of Civil Procedure for summary judgment on the 19th Count of the Additional Supplemental Complaint, and defendant having made no objection to plaintiff's motion to file the Additional Supplemental Complaint, and the parties having agreed that the rulings of this Court as set forth in the Court's Opinions filed December 5, 1977, and June 20, 1978, with regard to the Amendment To And Supplemental Complaint in this action are dispositive of the issues raised by the cross-motions for summary judgment on the 19th Count of the Additional Supplemental Complaint, and the parties having further agreed upon the dates from which prejudgment interest shall run as to the nine (9) purchase orders enumerated in the 19th Count of the Additional Supplemental Complaint, and good and sufficient cause having been shown,

Order Filed August 29, 1978

It is on this 29 day of August, 1978,

ORDERED:

1. That plaintiff's motion to file an Additional Supplemental Complaint be and the same is hereby granted;

2. That plaintiff's motion for summary judgment on the 19th Count of the Additional Supplemental Complaint in the amount of $10,535,872.00 be and the same is hereby granted, and any acceptance by Plaintiff of payment from Defendant pursuant to this Order will not operate to release Defendant and the Government, their officers, agents and employees from (1) the other claims of Plaintiff that are presently the subject of this law suit, (2) any other claim of Plaintiff as to any contract not listed in paragraph 137 of the Additional Supplemental Complaint or paragraphs 127 and 132 of the Amendment To And Supplemental Complaint, and (3) any claim of Plaintiff for final payment under any contract which is not listed in paragraph 137 of the Additional Supplemental Complaint or paragraphs 127 and 132 of the Amendment To And Supplemental Complaint.

3. That Plaintiff's motion for an award of prejudgment interest on the 19th Count of the Additional Supplemental Complaint be and the same is hereby granted, and prejudgment simple interest at the rate of six percent per annum shall run from the following dates with respect to each of the nine (9) purchase orders enumerated in the 19th Count of the Additional Supplemental Complaint:

Order Filed August 29, 1978

Purchase Order	Date Interest Begins to Run
B-451	January 26, 1977
B-452	January 19, 1977
B-428	January 26, 1977
A-641	May 15, 1978
A-656	May 21, 1977
A-661	July 19, 1978
A-675	May 15, 1978
B-478	June 2, 1978
A-113	August 14, 1978

4. That defendant's motion for summary judgment on the 19th Count of the Additional Supplemental Complaint be and the same is hereby denied.

s/ James A. Coolahan
JAMES A. COOLAHAN, U.S.D.J.

Consented to as to Form;

CRUMMY, DEL DEO, DOLAN & PURCELL
Attorneys for Plaintiff,
Curtiss-Wright Corporation

s/ Ralph N. Del Deo
Ralph N. Del Deo

HANNOCH, WEISMAN, STERN & BESSER
Attorneys for Defendant,
General Electric Company

s/ Albert G. Besser (JJF)
Albert G. Besser

Order Filed August 29, 1978

COLE AND GRONER, P.C.
Attorneys for Defendant,
General Electric Company

s/ Isaac N. Groner (JJF)
Isaac N. Groner

ORDER OF FINAL JUDGMENT ENTERED AUGUST 31, 1978

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 76-794

(Hon. James A. Coolahan)

[TITLE OMITTED]

This matter having been opened to the Court upon the motion of plaintiff, Curtiss-Wright Corporation, for an Order granting Rule 54(b) certifiction of this Court's Order of August 29, 1978, which awarded to plaintiff summary judgment and prejudgment interest upon Count 19 of the Additional Supplemental Complaint, and good and sufficient cause having been shown, for the reasons set forth in this Court's letter opinion filed July 27, 1978,

It is on this 29th day of August, 1978,

ORDERED, that final judgment be entered under Rule 54(b) encompassing the above referenced Order of August 29, 1978, there being no just reason for delay.

s/ James A. Coolahan
JAMES A. COOLAHAN,
U.S.D.J.

Consented to as to Form:

CRUMMY, DEL DEO, DOLAN & PURCELL
Attorneys for Plaintiff, Curtiss-Wright Corporation

s/ Ralph N. Del Deo
Ralph N. Del Deo

HANNOCH, WEISMAN, STERN & BESSER
Attorneys for Defendant, General Electric Company

s/ Albert G. Besser (JJF)
Albert G. Besser

COLE AND GRONER, P.C.
Attorneys for Defendant, General Electric Company

s/ Isaac N. Groner (JJF)
Isaac N. Groner

NOTICE OF APPEAL FROM ORDER OF FINAL JUDGMENT ENTERED AUGUST 31, 1978

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 76-794

(Hon. James A. Coolahan)

[TITLE OMITTED]

Defendant General Electric Company hereby appeals to the United States Court of Appeals for the Third Circuit from the Order of final judgment filed August 29, 1978, and the interlocutory Order filed August 29, 1978, subsumed therein.

COLE AND GRONER, P.C.

s/ Isaac N. Groner
ISAAC N. GRONER
WALTER H. FLEISCHER
ALFRED F. BELCUORE

1730 K Street, N.W.
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HANNOCH, WEISMAN,
STERN
& BESSER, P.A.

s/ Albert G. Besser
ALBERT G. BESSER

744 Broad Street
Newark, New Jersey 07102
Telephone: (201) 621-8800

Attorneys for Defendant
General Electric Company

Notice of Appeal Entered August 31, 1978

Dated:

September 13, 1978

Clerk please serve:

Ralph N. Del Deo, Esquire
Crummy, Del Deo, Dolan & Purcell
Gateway I
Newark, New Jersey 07102

Attorneys for Plaintiff
Curtiss-Wright Corporation

OPINION OF THE THIRD CIRCUIT COURT OF APPEALS, FILED APRIL 17, 1979

UNITED STATES COURT OF APPEALS

FOR THE THIRD CICRUIT

Nos. 78-2179 and 78-2293

CURTISS-WRIGHT CORPORATION,

v.

GENERAL ELECTRIC COMPANY,

Appellant.

(D.C. Civil No. 76-0794)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Argued March 22, 1979

Before SEITZ, *Chief Judge,* ALDISERT and ROSENN, *Circuit Judges.*

(Opinion filed April 17, 1979)

Opinion Filed April 17, 1979

Isaac N. Groner, Esquire
(argued)
Walter H. Fleischer, Esquire
Alfred F. Belcuore, Esquire
Cole and Groner, P.C.
1730 K Street, N.W.
Washington, D.C. 20006

Albert G. Besser, Esquire
Hannoch, Weisman, Stern
& Besser, P.A.
744 Broad Street
Newark, New Jersey 07102
Attorneys for Appellant

Of Counsel:

Jamie H. Geraron
General Electric Company
One River Road
Schenectady, N.Y. 12345

Ralph N. DelDeo, Esquire
(argued)
Richard S. Zackin, Esquire
Gerard C. Sims, Jr., Esquire
Crummy, DelDeo, Dolan &
Purcell
Gateway 1
Newark, New Jersey 07102
Attorneys for Appellee

Opinion Filed April 17, 1979

OPINION OF THE COURT

PER CURIAM.

In a diversity action by Curtiss-Wright Corp. (Curtiss) against General Electric Company (GE), the district court granted summary judgment to Curtiss on its claims for outstanding balances due on contracts with GE; additional claims arising out of the contractual relationship have not yet been adjudicated. The district court certified that the judgments were final under Rule 54(b) of the Federal Rules of Civil Procedure.

GE appealed the 54(b) judgments. It first contends that the entry of the 54(b) certifications was not consistent with a sound exercise of discretion, and thus requests this court to dismiss the appeals without consideration of the merits.

Curtiss, as subcontractor, entered into 21 subcontracts with GE, prime contractor for the Navy, to build component parts for propulsion systems on nuclear vessels for about $215 million. Most of the claims asserted by Curtiss were based on alleged fraud and misrepresentation by GE which caused cost overruns and prevented Curtiss from making a profit. Three of Curtiss's claims sought payment from GE on the outstanding balances due on the 21 subcontracts. GE counterclaimed for $60 million in costs incurred by it due to Curtiss's alleged failure to perform its contractual obligations competently.

The district court granted summary judgment on the claims for the amount of the outstanding balances and directed GE to pay Curtiss $19 million along with prejudgment interest. It further directed that such judgments were final under Rule 54(b) and stated its reasons for such action.

Opinion Filed April 17, 1979

GE asserts that the entry of the 54(b) certifications under the circumstances of this case was in direct conflict with the rules announced by this court in *Allis-Chalmers Corp.* v. *Philadelphia Electric Co.*, 521 F.2d 360 (3d Cir. 1975). We address that contention.

In *Allis-Chalmers* this court stressed that certification should be the exception rather than the rule, and delineated illustrative factors governing the trial court's discretion in certifying a judgment as final under 54(b). 521 F.2d at 364. We went on to state:

> In the absence of unusual or harsh circumstances,[14] we believe that the presence of a counterclaim, which could result in a set-off against any amounts due and owing to the plaintiff, weighs heavily against the grant of 54(b) certification.

Id. 366. Footnote 14 to the quoted sentence defined unusual or harsh circumstances as those factors "involving considerations of solvency, economic duress, etc."

The district court addressed the general requirements of *Allis-Chalmers* as they applied to this case, stating that the certification would not result in duplicative appellate review because the claims for final payment were totally distinct from the other issues in the case. It felt for the same reasons that the proceedings in the district court could continue pending the appeal and would not moot any determination of the merits of this appeal. The district court also felt that justice in this litigation would be served by certification because Curtiss would suffer daily financial losses from its inability to achieve a greater return on the $19 million judgment than the 6% interest authorized by New York law. The court also concluded that GE could

afford to pay and that Curtiss would be able to repay the funds if GE succeeded on its counterclaims.

[We turn to an examination of the reasons given by the district court for certifying these judgments. The first reason given was that certification would not result in a duplication of issues to be resolved after final judgment on all the claims. While this may be so, it is also entirely possible that there will be no need to decide the merits of this appeal if an appeal is taken from the final determination of all claims and counterclaims in this case. We say this because GE represents that the single issue it raises on the merits here will not be raised after final judgment.]*

The practical consideration here is that the court is being asked to say who should have the benefit of the money until the litigation is finally resolved. We think that *Allis-Chalmers* dictates that the matter remain in status quo when non-frivolous counterclaims are pending, and in the absence of unusual or harsh circumstances.

Finally, and of decisive significance, it is tacitly conceded that the only harsh circumstance presented here is Curtiss's inability to use the money from the judgment. The result is indeed harsh from Curtiss's viewpoint, but what if GE prevails on its compulsory counterclaim? How is its loss resulting from the deprivation of the money to be restored? In any event this factor was rejected as controlling in *Allis-Chalmers*. Indeed, this was the primary basis for the dissent in *Allis-Chalmers*. *See* 521 F.2d at 367 (Gibbons, J., dissenting). As a three judge panel, we

* Portions in [] were subsequently modified by orders of the Court. See App. at 243a.

are bound to apply *Allis-Chalmers* here. *See* Third Circuit Internal Operating Procedures, Chapt. VIII, C.

The appeal will be dismissed for want of an appealable order with a direction to the district court to vacate so much of its judgment as purported to render a final judgment pursuant to Rule 54(b). Each party shall bear their own costs.

ROSENN, *Circuit Judge*, Dissenting

I respectfully dissent because I believe that the district court's certification of this appeal under Rule 54(b), Fed. R. Civ. P., was not an abuse of discretion.

Curtiss-Wright Corporation ("Curtiss-Wright") entered into twenty-one subcontracts to deliver components to General Electric Company ("GE"), a prime contractor for the United States, for eventual use in the construction of nuclear naval vessels. In connection with these contracts, Curtiss-Wright brought a suit against GE in which Curtiss-Wright sought damages and reformation of the subcontracts, alleging fraud, misrepresentation, and contractual breaches by the defendant. GE then withheld the final payments to Curtiss-Wright for the material manufactured and supplied by Curtiss-Wright, and GE interposed counterclaims alleging that Curtiss-Wright had failed to perform competently, and that as a consequence GE was required to render it extraordinary assistance. Curtiss-Wright then added to its complaint three counts seeking the final payments that GE had held back.

Although it is conceded that Curtiss-Wright had manufactured and delivered to GE the components for which the

final payments were claimed, and GE did not object to the quality of the parts, GE refused to make the payments.[1] In this refusal, GE relied on a contractual provision which, as GE interposed it, conditioned the final payments on Curtiss-Wright's release of all claims against GE. Because Curtiss-Wright was suing GE for fraud, misrepresentation, and contractual breaches, it would not assent to any such release. Applying the law of New York in this diversity suit, the district court ruled that, notwithstanding the contractual provision on which GE rested its argument, Curtiss-Wright was entitled to judgment on its claims for the final payments. The partial summary judgment won by Curtiss-Wright amounted to nearly 19 million dollars. The district court then certified its judgment for immediate appeal, while retaining jurisdiction over Curtiss-Wright's other claims and GE's counterclaims.

In *Allis-Chalmers Corp.* v. *Philadelphia Electric Co.*, 521 F.2d 360 (3d Cir. 1975), this court set out several considerations that a district court should take into account when it rules upon a motion for certification under Rule 54(b). Unless, in weighing these factors, the district court has abused its broad discretion, we may not disturb its decision in favor of certification. *Id.* at 367 n.16. *See Sears Roebuck & Co.* v. *Mackey*, 351 U.S. 427, 437 (1956). The Rule "defines finality in terms of what the district

[1] It is undisputed that as of September 23, 1976, Curtiss-Wright had made and General Electric had accepted delivery of all of the large components called for by twelve of the twenty-one subcontracts which formed the basis for the district court's partial summary judgment. By August 28, 1978, GE had accepted delivery of the parts manufactured by Curtiss-Wright under the remaining nine subcontracts.

court does and gives this court broad discretion in applying finality." 6 Moore's Fed. Practice ¶ 54.28[1].[2]

In my judgment, the trial judge identified two considerations of sufficient gravity to justify his exercise of discretion. First, Judge Coolahan noted an economic consideration favoring immediate appeal. *See Allis-Chalmers Corp.* v. *Philadelphia Electric Co., supra* 521 F.2d at 364. He concluded that Curtiss-Wright, under New York law, can recover prejudgment interest of only six percent. The interest on the award already granted by the district court will continue in the face of the high cost of money to accrue at this comparatively low rate until Curtiss-Wright can execute on its judgment. If this court were to hear the appeal certified by the district court and to sustain the district court's judgment, Curtiss-Wright could execute immediately. Because of the disparity between six percent simple interest and the much higher interest rates now prevalent in the marketplace, Curtiss-Wright will lose (as GE conceded at oral argument) over ε million dollars per

[2] Because federal rules provide extensively for the presentation of numerous claims that are often diverse, unrelated, and involve multiple parties, "it was highly desirable that the district court be given broad powers to enter separate judgments. . . ." 6 Moore's Fed. Practice ¶ 54.22. The Rule gives the trial judge the necessary elasticity because he has firsthand information as to the litigation, its progress, and the timeliness for a separate judgment and appellate review. He is in "an excellent position to determine from the standpoint of justice to the litigants the best time at which to terminate by final judgment of the litigation with respect to a single claim in the multiple claims suit and thus to open the way to immediate appellate review and execution of judgment." Bendix Aviation Corp. v. Glass, 195 F.2d 267, 272 (3d Cir. 1951) (Maris, J.).

year until this litigation can be finally consummated. This could conceivably take years to complete.[3]

The Tenth Circuit accepted a similar argument in *United Bank of Pueblo* v. *Hartford Accident & Indemnity Co.*, 529 F.2d 490 (10th Cir. 1976). The court considered a delay as brief as ten months in collecting a judgment, although very much smaller than the one *sub judice,* to constitute "a financial injustice" in the face of a high interest rate in the market. *Id* at 493. Judge Coolahan cited that case in support of his certification.

The prediction about Curtiss-Wright's losses assumes that if Curtiss-Wright's judgment were satisfied now, the company, by outside investment of the proceeds, could secure a rate of return approximating the interest available in the market. But Curtiss-Wright might have, as it indicated at oral argument, a more efficient use for the money if it devoted the 19 million dollars to its own operations. Even for a large corporation, such as Curtiss-Wright, a block of capital as great as this can play a significant part in the operations of the economy.

This is not to say the district court should certify every money judgment carrying prejudgment interest of less than the market rate. Such a conclusion would conflict with *Allis-Chalmers,* which suggested that a district court ascertain whether the action before it is "the infrequent harsh case" warranting certification. But when the judgment is for a very large sum of money, and the current

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[3] The district court also noted that "because of the complex nature of the remaining claims in this case, the delay in payment which would occur if certification is denied would span many months, if not years." He concluded that "great injustice would result from further delay."

cost of money is exceptionally high, the substantial loss to the creditor caused by further delay must be weighed by the court. In assessing economic considerations, a district court should weigh the size of the judgment, the degree of disparity between market interest and prejudgment interest, and the importance of the award for the prevailing party, as well as the other considerations recognized by *Allis-Chalmers.*[4] In this case, the district court touched all of these bases.

In putting aside the district court's careful considerations, the majority stresses the existence of GE's counterclaims. It relies on the passage in *Allis-Chalmers* that the presence of a counterclaim, in the absence of unusual or harsh circumstances, "weighs heavily against the grant of 54(b) certification." 521 F.2d at 366. But note 14 of that opinion suggested, without limitation, that "unusual or harsh circumstances" referred to "considerations of solvency, economic duress, etc." In the present case, the majority notes that GE's counterclaims are not frivolous, and it argues that the district court identified no "unusual or harsh circumstances" justifying certification. The disparity of interest rates, it urges, cannot constitute "unusual or harsh circumstances" because "this factor was rejected as controlling in *Allis-Chalmers.*" By this statement the majority evidently means that, despite the presence of losses due to interest rates, *Allis-Chalmers* allowed the posibility that certification there might have been improper. I disagree with the majority's analysis about the effect of GE's counterclaims.

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[4] Even if *Allis-Chalmers* did not develop the contours of the meaning of "economic considerations," 521 F.2d at 364, that opinion observed that it did not exhaust the catalog of factors. 521 F.2d at 364 n.6.

Allis-Chalmers did not hold that the deprivation of the use of money would never constitute "unusual or harsh circumstances" outweighing the existence of counterclaims. Indeed, the majority in *Allis-Chalmers* never even reached the *merits* of the district court's certification; it focused only on the mischief of unbridled certifications and the necessity for a statement of reasons by the district court when it grants a 54(b) certification:

> Notwithstanding the stridency of the dissent, our holding is not that this was an improper case for Rule 54(b) certification. We have remanded *only* for a *statement of reasons* so that this court may properly determine if this was "the infrequent harsh case" warranting final certification. . . .
>
> We express no opinion on the dissent's analysis of the factors to be considered by the district court because, in the view we take, that is a proper function for the district court. Our consideration of such factors is only to determine whether the district court abused its discretion in granting final certification.

Allis-Chalmers Corp. v. *Philadelphia Electric Co., supra* 521 F.2d at 367 n.16 (original emphasis).

Nothing in *Allis-Chalmers* forecloses the conclusion that it would be unreasonable—even harsh—to prevent Curtiss-Wright's use of the proceeds from a 19 million dollar judgment. The district court properly examined the size and importance of Curtiss-Wright's prospective losses. In this connection, one should not minimize the effect, even upon a large corporation, of a deprivation of the use of almost 19 million dollars in operating capital since September 1976, especially during an inflationary period and in a tight money market.

It is true, as the majority contends, that GE may ultimately prevail on its counterclaims and that, in this event, GE and not Curtiss-Wright would have suffered the deprivation of 19 million dollars during the interim. It is also true, however, that GE may fail in its counterclaims, so that the disadvantage would be placed on Curtiss-Wright. Unlike the majority, I do not read *Allis-Chalmers* to dictate "that the matter remain in status quo when non-frivolous counterclaims are pending." Rule 54 gives the district court discretion, it seems to me, to consider the size of the loss due to a disparity in interest rates, the indefinite deprivation of substantial working capital advanced in behalf of GE, and the consequent importance for the litigants.

In the context of Rule 54(b), which contemplates that delay in reviewing partial judgments may be harmful and oppressive, our standard of review is limited to ascertaining whether the district court abused its discretion when it certified "there is no just reason for delay" and directed the entry of final judgment upon three of the claims aggregating approximately 19 million dollars. This court may not and should not substitute its judgment for that of the district court. *Allis-Chalmers* only directs the district court to articulate its reasons when it directs the entry of a final judgment on fewer than all the claims. Our review function on the certification should be merely an inquiry as to whether the justification proffered has a reasonable basis.

In any event, the passage from *Allis-Chalmers* concerning counterclaims does not designate the existence of a

counterclaim as absolutely decisive, even in the absence of harsh circumstances. Otherwise, the assertion of any counterclaim, even one contrived, would defeat the possibility of certifying an appeal under Rule 54(b), a situation hardly contemplated by the authors of the Rule. [*Allis-Chalmers* only prescribed that the district court weigh a counterclaim "heavily." There is in the present case, however, a second factor that both establishes the harshness of circumstances here and has an independent significance to be balanced against the counterclaims.

Although the district court stated unequivocally that the issues to be reviewed in a certified appeal would not duplicate any of the issues raised by the remaining claims and noted that certification would not entail unnecessary appellate review[5] the majority asserts that if this appeal

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[5] Judge Coolahan concluded that certification would not in any way result in unnecessary appellate review.

> The claims which have been finally adjudicated are separate, distinct, and independent of any of the other claims or counterclaims involved in this lawsuit. Plaintiff's other claims generally seek recovery for alleged cost overruns and lost profits, and defendant's counterclaim generally seek to recover for the costs of alleged technical assistance provided by the defendant to the plaintiff. For this reason, certification should not prevent the rest of this case from being prepared for trial. Also, because of the above, the need for review will not be mooted by any future developments in the District Court. The determinations by the District Court regarding the claims sought to be certified under Rule 54(b) are final and will not be changed by later developments in the District Court. Furthermore, because of the nature of the claims which are involved, the appellate courts will not need to decide the same issues more than once even if two appeals arise out of this case.

is dismissed, the issues now presented may no longer exist in an appeal from a later judgment on the whole case. The basis for this possibility lies in the nature of Curtiss-Wright's contract claims for the final payments. GE is resisting the claims on the sole ground that Curtiss-Wright still has other claims outstanding against it. When Curtiss-Wright has litigated all of these other claims, GE will acknowledge the 19 million dollar debt it owes Curtiss-Wright.

But suppose, as the district court concluded, that New York law rejects GE's interpretation of the contractual provision on which GE relies in resisting payment. Waiting for this contract issue to disappear in a later appeal would be effectively to enforce GE's incorrect view of New York law. GE contends that, by virtue of its contract as interpreted under the law of New York, the company may delay its final payments until all other claims against it have been resolved. Because the court dismisses this appeal as improperly certified, this contract issue will indeed vanish. But the reason will be that, even though the law of New York rejects GE's asserted right to delay payment, GE will have achieved fully by our preclusion of the appeal what it sought through its argument on the merits.[6]

I do not mean to suggest that this result would violate the rule of *Erie Railroad Co.* v. *Tompkins,* 304 U.S. 64 (1938), which requires federal courts, sitting in diversity, to apply state substantive law. I do mean to say that the danger of an oblique victory for GE's contract defense,

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[6] Although under *Allis-Chalmers,* the possibility that a claim may be mooted counts against certification, *Allis-Chalmers* refers to a dif-

(Footnote continued on following page)

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accomplished by the preclusion of this appeal, bears on whether the district court abused its discretion in certifying the judgment under Rule 54(b).]*

Being persuaded that the district court did not abuse its discretion, I would reach the merits of the contract issue. For the reasons so well expressed in the district court's opinion, I would sustain the summary judgment in favor of Curtiss-Wright.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

(Footnote continued from preceding page)

ferent sense of mootness from that involved here. *See* Allis-Chalmers Corp. v. Philadelphia Electric Co., *supra* 521 F.2d at 364 & n.8. On the issue of mootness *Allis-Chalmers* cited Panichella v. Pennsylvania R.R. Co., 252 F.2d 452, 455 (3d Cir. 1958), in which the district court certified a claim asserted by the defendant against a third party. As the court, in *Panichella* wrote, "the third-party claim is so completely incidental to and dependent upon the principal claim that there can be no recovery upon the third-party claim unless the plaintiff shall prevail on the principal claim." *Id.* If, in *Panichello,* the third-party claim became moot, the parties litigating the claim would have lost nothing by the delay in review, and judicial resources would be conserved. Decision on the mooted claim could truly be avoided. Here, by contrast, the delay in review hurts Curtiss-Wright, because the basis of mootness will be that GE, through the delay, will have already gained the very point it seeks in its substantive argument. This court, in effect, will not avoid decision on the mooted claim; it will have effectively decided the claim in favor of GE.]*

*** Portions in [ ] were subsequently modified by order of the Court. See App. at 244a, 245a.**

APPELLANT'S MOTION TO AMEND THE OPINION OF THE THIRD CIRCUIT COURT OF APPEALS, FILED MAY 1, 1979

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 78-2179
No. 78-2293

CURTISS-WRIGHT CORPORATION,

Appellee,

v.

GENERAL ELECTRIC COMPANY,

Appellant.

APPELLANT'S MOTION TO AMEND OPINION OF COURT

Appellant General Electric Company, attaching hereto the transcript of the oral argument, respectfully moves the Court to amend its Opinion of April 17, 1979, by the excision of the final sentence in the first full paragraph on page 4 of its Slip Opinion: "We say this because GE represents that the single issue it raises on the merits here will not be raised after final judgment." It is respectfully submitted that, as the preceding sentence of the Court Opinion states, the pertinent colloquy between the Bench and counsel for G.E. concerned the possibility or likelihood that the issue would not be raised, and did not include or request any representation that the issue on the merits would not be raised by G.E. under any circumstances.

The pertinent portions of the argument follow (transcript attached, pp. 11-12, emphasis added):

"THE COURT: May I ask you a question. I may be way off base, so don't hesitate to tell me so, if this present appeal is not allowed, will that issue still be a live issue after the case is completely disposed of in the District Court?

"MR. GRONER: That issue should not arise. It might depend on the exact circumstances, but presumably, the decision in the District Court, but unless there were appeals, presumably, the decision in the District Court would be a final adjudication of all claims and would enable —

"THE COURT: I'm postulating that.

"MR. GRONER: Then, it would enable, Your Honor, the submission of a release of all claims, based upon the carrying out of the judgment of the District Court and, therefore, would satisfy the condition precedent.

"THE COURT: Right. So that it's *possible* that if this appeal is not allowed, that this Court will never have to face the issue now briefed as point two; is that right?

"MR. GRONER: Yes, Your Honor, in our view, that is correct."

In short, we believe that the discussion at oral argument does not reflect that any representation was made that the issue "will not be raised after final judgment"; but it is precisely consonant with the Court's statement that "it is also *entirely possible* that there will be no need to decide the merits of this

appeal if an appeal is taken from the final determination of all claims and counterclaims in this case" (Slip Op. 4; emphasis added).

While we did point out that Curtiss-Wright presumably would be in a position at the end of the litigation to provide a release, and that final payment could be made at that time, we did not mean to suggest that the issue of whether Curtiss-Wright has failed at this time to meet a condition precedent to final payment will necessarily be moot at the end of the litigation, or that G.E. might not in some circumstances have to litigate the point further on appeal. At the end of the litigation, as noted, Curtiss-Wright would be in a position to give a conforming release and hence to receive final payment. However, the issue of whether Curtiss-Wright is owed any interest for the interim period until that release is given conceivably could be disputed at the end of the litigation. It is G.E.'s present position that Curtiss-Wright is not so entitled to interest because it has not met a condition precedent to payment and its right to the monies at issue therefore has not accrued. This is the G.E. position on the merits of the appeal which counsel made clear G.E. was relying upon if the appeal were not to be dismissed (*e.g.*, transcript attached, pp. 32-33).

It was G.E.'s position that the appeal should be dismissed, whether or not the same issues might be raised on the ultimate appeal, because of the overriding policy against interlocutory appeals as clearly elucidated in *Allis-Chalmers Corp. v. Philadelphia Electric Co.*, 521 F.2d 360 (3rd Cir. 1975) ("*Allis-Chalmers*"). Because the counterclaim was compulsory and for other reasons, in relation to *Allis-Chalmers*, this case *a fortiori* requires the holding that the appeals should be dismissed for want of an appealable order and direction to the District Court to vacate so much of its judgment as purported to render a final judgment pursuant to Rule 54(b).

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The Opinion of the Court plainly rested upon the legal identity between this case and *Allis-Chalmers;* and excision of the sentence, it is respectfully submitted, would affect neither the reasoning nor the Judgment of the Court. The discussion of the factors involved, including the final factor held to be "of decisive significance" (Slip Op. 4), would lose none of its manifest validity. The Opinion of the Court, if this Motion were granted, would still of course amply discuss the grounds relied upon by the District Court in its attempt to distinguish *Allis-Chalmers* and persuasively demonstrate that those grounds are not sustainable.

For the reasons stated herein, Appellant General Electric Company prays the Court to excise the final sentence in the first full paragraph on page 4 of its Slip Opinion.

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RESPONSE OF APPELLEE, CURTISS-WRIGHT CORPORATION, TO APPELLANT'S MOTION TO AMEND THE OPINION, FILED MAY 10, 1979

IN THE UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 78-2179
No. 78-2293

[TITLE OMITTED]

Appellant, General Electric, has filed a motion to amend the Court's Opinion of April 17, 1979. Specifically, appellant requests that the Court excise from the Opinion the following sentence:

> We say this because General Electric represents that the single issue it raises on the merits here will not be raised after final judgment. (Slip at 4).

Citing the relevant colloquy at oral argument, General Electric's counsel asserts that he *did not* represent that the issue "[G.E.] raises on the merits", *i.e.*, the release issue, will not be raised after final judgment. Rather, counsel maintains that in his remarks at oral argument he only "point[ed] out that Curtiss-Wright presumably would be in a position at the end of the litigation *to provide a release* and that final payment could be made at that time . . . " (G.E. Motion at 3) (emphasis added).

The importance of counsel's clarification of his client's "present position" is that he frankly concedes that whether Curtiss-Wright is entitled to *prejudgment interest* on the final payments awarded to it under Judge Coolahan's summary judgment Orders depends in turn upon the resolution of the release issue (G.E. Motion at 3). Thus, counsel for General

Electric has confirmed *exactly* what Curtiss-Wright has maintained in its Petition for Rehearing pending before this Court, namely, that General Electric has not represented that it will pay Curtiss-Wright prejudgment interest on the final payment amounts and can be expected to re-appeal the release issue at the end of the case rather than pay the millions of dollars in pre-judgment interest which will by then have accumulated. *See* Point IC of "Petition for Rehearing for Appellee Curtiss-Wright Corporation" at 11-12.

Nevertheless, even though no representation has been made and General Electric has not modified its position that Curtiss-Wright *must submit a release* prior to final payment, counsel for appellant inexplicably has not moved to have exercised the *conclusion* which the Court drew from the non-existent representation, *viz:* that "it is also entirely possible that there will be no need to decide the merits of this appeal . . . " (Slip at 4). *See* G.E. Motion at 3. Absent the representation, however, the Court's conclusion has no rational basis.

Contrary to what General Electric might suppose, no matter how the remaining claims in suit, including the counterclaim, are resolved,[1] Curtiss-Wright is not about to submit a release or do anything else which would operate to release the award of prejudgment interest which Judge Coolahan has included in his

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1. It should be noted that General Electric never asserted its counterclaim against either Curtiss-Wright's motions for summary judgment or its motions for prejudgment interest, and any recovery on the counterclaim *will not* affect Curtiss-Wright's award of prejudgment interest on its final payment claims. We call this to the Court's attention with all due respect, because, at the time of oral argument, at least one member of the majority apparently thought, erroneously, that a recovery by General Electric on the counterclaim would mean that Curtiss-Wright would not have been entitled to prejudgment interest. (Transcript of Appellate Argument at 16). Only a reversal of Judge Coolahan on the release issue can affect the award of prejudgment interest.

orders for summary judgment and which by the end of the case will most likely be at least double or triple the present total of $1.5 million.[2] Likewise, it will not be a surprise to anyone when, at the end of the case, General Electric files another appeal on the release issue to attempt to save itself these millions of dollars in prejudgment interest.

Clearly, Judge Coolahan did not abuse his discretion in certifying as final his Summary Judgment Orders because of the remote, if not non-existent possibility that the release issue might become moot. The decision to exercise or not excercise Rule 54(b) discretion does not and should not turn on what can only be called wishful thinking on General Electric's part.[3]

Finally, General Electric contends that the Court's judgment denying jurisdiction over these appeals should not be reversed even though the Court was operating under a misapprehension as to the significance of counsel's remarks. Curtiss-Wright disagrees and maintains that the release issue should be decided by this Court *now*.

First, our reading of the Opinion is that the Court's discussion of the mootness issue was not gratuitous but concerned an issue important to the Court's determination. *Allis-Chalmers* itself places a substantial weight in the 54(b) determination process on the possibility of mootness or the absence of such possibility. 521 F.2d 360, 364 (3d Cir. 1975).

2. *I.e.*, as of the dates of the District Court's final judgment Orders.

3. General Electric also reasserts its position that certification in this case has violated the rule against interlocutory appeals (G.E. Motion at 4). These appeals, however, are clearly appeals from final judgments and are not interlocutory appeals. The *Allis-Chalmers* case specifically so holds, 521 F.2d 360, 362-63 (3d Cir. 1975), and we submit that there is no need for further argument on this point.

In addition, in light of General Electric's "present position" which, in effect, is that it will re-appeal the release issue, it becomes imperative for the Court to exercise jurisdiction over these appeals at this time. Otherwise, Curtiss-Wright's award of prejudgment interest presently totaling $1.5 Million will continue to run at the rate of *$3,000 per day!*. Surely this is not a typical case. The Court should not permit this potential recovery to remain uncertain in the minds of the parties throughout the remainder of the litigation. Such *uncertainty* can only have adverse affects upon the subsequent course of litigation and/or the settlement thereof as well as on the business planing of the litigants. On this basis alone, we submit that the release issue is now ripe for appeal.

Curtiss-Wright submits that the Court cannot properly resolve the matter by simply granting General Electric's motion to amend. As set forth in detail in Curtiss-Wright's Petition for Rehearing, the Court, when it first considered these appeals, was under a misapprehension as to the nature of General Electric's counterclaim[4] in addition to its misunderstanding as to the representation of General Electric's counsel. We respectfully suggest that a rehearing on these issues is necessary to serve the interests of justice in this case.

4. See Points 1A and 1B of the "Petition for Rehearing for Appellee Curtiss-Wright Corporation" at 3-11.

Response to Motion

CONCLUSION

For the foregoing reasons appellant's motion to amend the Opinion of the Court, insofar as appellant argues that the proposed amendment does not affect the Judgment of the Court, should be denied.

Respectfully submitted,

Crummy, Del Deo, Dolan
& Purcell
Attorneys for Appellee,
Curtiss-Wright Corporation

By: Ralph N. Del Deo
Richard S. Zackin
Gerard C. Sims

ORDER OF THE THIRD CIRCUIT COURT OF APPEALS AMENDING OPINION, DATED MAY 11, 1979

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 78-2179 and 78-2293

CURTISS-WRIGHT CORPORATION,

v.

GENERAL ELECTRIC COMPANY,
Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Present: SEITZ, *Chief Judge,* ALDISERT and ROSENN,
Circuit Judges

ORDER AMENDING OPINION

It is ORDERED that the first full paragraph on page 4 of the printed slip opinion in the above captioned matter, filed on April 17, 1979, be and hereby is deleted.

BY THE COURT,

SEITZ
Chief Judge

DATED: May 11, 1979

ORDER OF THIRD CIRCUIT COURT OF APPEALS AMENDING DISSENTING OPINION, DATED MAY 21, 1979

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

Nos. 78-2179
78-2293

CURTISS-WRIGHT CORPORATION,

v.

GENERAL ELECTRIC COMPANY,

Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

D.C. Civil No. 76-0794

Before SEITZ, *Chief Judge*, ALDISERT and ROSENN, *Circuit Judges*

ORDER AMENDING DISSENTING OPINION

The dissenting opinion in the above-entitled matter, filed April 17, 1979, is amended as follows:

Order Dated May 21, 1979

1. The text is deleted from line 23 at page 10 of the slip opinion, beginning with the words "*Allis Chalmers* only prescribed," through the end of line 8 on page 12, which concludes with the words "judgment under Rule 54(b)", including footnote 6.

2. The following paragraph is substituted in place of the deleted text:

> There is in the present case, however, a second factor that both establishes the harshness of circumstances here and has an independent significance to be balanced against the counterclaims. The district court stated unequivocally that the issues to be reviewed in a certified appeal would not duplicate any of the issues raised by the remaining claims and noted that certification would not entail unnecessary appellate review.[5]

3. Footnote 5 is retained as it is in the original slip opinion.

MAX ROSENN
Circuit Judge

Dated: May 21, 1979

ORDER OF THE THIRD CIRCUIT COURT OF APPEALS DENYING THE PETITION FOR REHEARING, DATED JUNE 4, 1979

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

Nos. 78-2179 & 78-2293

CURTISS-WRIGHT CORPORATION,

v.

GENERAL ELECTRIC COMPANY,

Appellant.

SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge*, and ALDISERT, ADAMS, GIBBONS, ROSENN, WEIS and HIGGINBOTHAM, *Circuit Judges.**

The petition for rehearing filed by Appellee in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular

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* Judges Hunter and Garth did not participate in the consideration of this matter.

Order Dated June 4, 1979

active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

For the reasons pointed out by Judges Rosenn and Gibbons, Judges Adams and Higginbotham believe that the issues raised in this appeal are of sufficient importance so as to command the attention of the full Court. Accordingly, they vote for rehearing.

BY THE COURT

ALDISERT
Judge

Dated: June 4, 1979

DISSENTING OPINION SUR DENIAL OF PETITION FOR REHEARING, FILED JUNE 4, 1979

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

Nos. 78-2179 and 78-2293

CURTISS-WRIGHT CORPORATION,

v.

GENERAL ELECTRIC COMPANY,

Appellant.

(D.C. Civil No. 76-0794)

DISSENTING OPINION SUR DENIAL OF PETITION FOR REHEARING

(Filed—June 4, 1979)

GIBBONS, *Circuit Judge*, dissenting:

I dissent. In a casual *per curiam* opinion[1] the panel majority, without analysis or explanation, has established a virtual *per se* barrier to Rule 54(b) certification in civil damage actions involving counterclaims. With similar un-

[1] Internal Operating Procedure V.B.1. specifies that *per curiam* opinions are to be reserved for "those cases where the law is relatively clear and does not necessitate a signed opinion." With deference, I suggest that Judge Rosenn's opinion persuasively demonstrates that this is not a proper case for a *per curiam* disposition.

illumination the panel majority also adopts the rule that financial hardship should never be a justification for Rule 54(b) certification unless the claimant is insolvent. These extraordinary holdings find no support in the prior law of this circuit and run directly counter to the spirit and purpose of Rule 54(b). If applied literally and consistently, they will sharply limit the effective use of Rule 54(b) in this circuit, with resulting harm both to litigants and to the ability of district judges to expedite the disposition of cases. This threat to the integrity of the Rule 54(b) certification process is worthy of the court's *en banc* attention.[2]

I. THE FACTS

This suit is a paradigmatic example of a complex commercial litigation. It grows out of the performance, over a period of nearly a decade, of 21 subcontracts for the production of nuclear propulsion components. These subcontracts had a total value of $215 million. Curtiss-Wright's initial complaint pleaded 16 counts of fraud, misrepresentation, and breach of contract on the part of General Electric in the performance of various subcontracts. Three counts later added by an amended complaint sought $19 million in contract price balances owed under the 21 subcontracts. The latter claims are the subject of this appeal.

General Electric's counterclaim is in two parts. Counts I-IV of the counterclaim constitute a single attempt to

[2] This dissent necessarily retraces some of the ground covered in Judge Rosenn's thoughtful dissent from the panel opinion, with which I fully agree. I write separately only to stress certain features of this case which make it a particularly worthy subject for *en banc* reconsideration.

recover, on different theories, for $1.9 million in costs incurred as the result of "extraordinary efforts" in the nature of technical assistance provided to Curtiss-Wright during the performance of the 21 contracts in suit. Count V sweeps more broadly. In it, General Electric claims that the same "extraordinary efforts" for which it seeks to recover in Counts I-IV of the counterclaim enabled Curtiss-Wright to avoid a contract default and a consequent loss of $52 million. General Electric asserts a claim to that $52 million on the theory that Curtiss-Wright has been unjustly enriched by what it never gained, but did not lose.

The facts underlying most of the claims in this extraordinarily large and complex commercial dispute are hotly disputed. Reviewing the case, the district court concluded that full resolution of all of the issues in the case would require "many months, if not years." Certainly this court is in no position to contest that conclusion. Curtiss-Wright's $19 million claim on the subcontracts, however, is not subject to factual dispute. General Electric has accepted the Curtiss-Wright components, has found no fault with them, and has used them in the performance of its prime contract with the Navy. Its sole defense to the claims to payment on the subcontracts is Article 5(c), a provision in each agreement which requires that as a condition to final payment Curtiss-Wright must release all claims arising out of the performance of that agreement. General Electric contends that so long as Curtiss-Wright's 16 claims remain pending Article 5(c) constitutes a bar to recovery of the undisputed contract balances. The application and interpretation of Article 5(c) to the 16 claims presents a pure question of law which the district court decided in Curtiss-Wright's favor. With the exception of that legal issue, there is no dispute that Curtiss-Wright is entitled to final payment upon the subcontracts.

II. The District Judge's Decision

With the case in this posture, more than two years after the filing of the original complaint, the district judge granted Curtiss-Wright's motion for summary judgment on the three subcontract claims. The court then made both the "express direction" for entry of judgment and the determination that there was "no just reason" for delay required by Rule 54(b). In doing so, it complied fully with this court's decision in *Allis-Chalmers Corp.* v. *Philadelphia Electric Co.*, 521 F.2d 360 (3d Cir. 1975), by providing a carefully considered written statement of reasons supporting the decision to direct entry of a final judgment. In that statement the court noted that the certification remedy was to be reserved for "the infrequent harsh case." Moreover, he found that the presence of General Electric's counterclaim, and the consequent possibility of a setoff, militated against certification. But on balance, he concluded that sound judicial administration and fairness to litigants would ultimately be advanced by certification. With regard to judicial administration, the court found that the certification of the order as a final judgment could not result in unnecessary or duplicative appellate review: the contract claim was "separate, distinct, and independent of any other claims in this lawsuit," and would not be mooted by further proceedings in the case. The district court also concluded that certification would cause delay or inefficiency at the trial court level, since the other claims in the case could be prepared for trial during the pendency of the appeal.

On the issue of fairness to the litigants, the district court noted that until judgment was entered on the contract counts Curtiss-Wright would be entitled only to 6%

prejudgment interest on its $19 million claim, and would be required to absorb the difference between that rate and the much higher market rate of interest, thereby suffering "daily financial losses from nonpayment of these liquidated debts." This injustice, the court concluded, could prove exceptionally severe since "because of the complex nature of the remaining claims in this case, the delay in payment which would occur if certification were denied would span many months, if not years."

III. The Panel Majority Opinion

The panel majority opinion rejects the district court's carefully considered decision on two grounds. First, it postulates that *Allis-Chalmers Corp.* v. *Philadelphia Electric Co., supra,* establishes blanket presumption against the certification of separate claims where a counterclaim is pending. Second, it holds as a matter of law the district court could not have viewed the loss of over one million dollars in annual interest, even for a period of "many months or years," as a "harsh circumstance" sufficient to overcome that presumption and permit an immediate appeal. It therefore concludes that, despite the district judge's unchallenged finding that this appeal poses no risk of delay or wasted effort at either the trial court or appellate level, the decision to enter final judgment on the $19 million claim must be reversed.

IV. The Panel Majority's Use of Precedent

The panel majority opinion effectively holds that the district court may not enter a Rule 54(b) money judgment in an action in which a non-frivolous counterclaim has been

filed unless the party seeking to recover on the judgment is insolvent. The opinion makes no serious effort to justify this result. Rather, it asserts that its decision is compelled by this court's decision in *Allis-Chalmers.* In support of this conclusion, however, it cites not to the *Allis-Chalmers* majority opinion, but to my *dissent* in that case.

I am underwhelmed. First, as Judge Rosenn points out,[3] Judge Garth's majority opinion in *Allis-Chalmers* stresses that the reversal and remand of the Rule 54(b) certification in that case did *not* rest on a determination "that this was an improper case for Rule 54(b) certification." 521 F.2d at 367 n.16. According to the *Allis-Chalmers* court the remand was "*only* for a *statement of reasons,*" and "express[ed] no opinion on" the merits. *Id.* (emphasis in original). Second, contrary to the panel majority's assertion, my dissent in *Allis-Chalmers* was not directed to the majority's improper evaluation of the merits of the certification, but rather to its unprecedented and unwarranted imposition of a "statement of reasons" requirement in a case where the justification for certification was glaringly apparent on the face of the record. This is evident from even a cursory reading of the passage cited by the panel majority. *See* 521 F.2d at 367. Finally, although *dicta* in *Allis-Chalmers* might be read to cut against certification here, there is, as Judge Rosenn demonstrates,[4] other language in the opinion which would permit and indeed encourage the result reached by

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[3] Dissenting Opinion at 9.

[4] Dissenting Opinion at 8.

the district court.[5] The majority's unsupported conclusion that *Allis-Chalmers* controls here simply cannot be credited.

V. Analysis

The fact that the panel majority opinion is neither controlled nor supported by prior precedent does not of course demonstrate that its holding is erroneous, or that it warrants the court's *en banc* consideration. Thus I turn to the substance of the panel majority's argument.

A. *The Creation of a Presumption against Certification in Suits involving Counterclaims*

The first holding is that the presence of a counterclaim is an action for money damages creates a presumption against a Rule 54(b) certification. This is a gross oversimplification of the Rule 54(b) inquiry, and conflicts with prior decisions of the Supreme Court and of this court sitting *en banc*. True, "[t]he district court's discretion in entering a Rule 54(b) certificate where a counterclaim is involved should be exercised with special care." 6 *Moore's Federal Practice* ¶ 54.35 at 585 (2d ed. 1976). The reason is straightforward: experience shows that in cases where a counterclaim (particularly a compulsory counterclaim) has been filed, there is an increased possibility that there

[5] It is worth noting that the district judge in *Allis-Chalmers* clearly did not regard that decision as barring Rule 54 certification of a money judgment when a counterclaim was pending. On remand, after preparing the "statement of reasons" demanded by the *Allis-Chalmers* majority, he immediately reentered judgment upon the claim. *See Note,* 54 N.C.L. Rev. 1265, 1274 n.58 (1976).

will be some "just reason" to delay the entry of judgment. For example, the presence of a compulsory counterclaim may indicate that there is a risk that in a second appeal from judgment on the counterclaim the court of appeals will be required to consider virtually the same factual and legal questions presented in the Rule 54(b) appeal. *Panichella* v. *Pennsylvania R.R. Co.,* 252 F.2d 452, 455 (3d Cir. 1958). In other counterclaim cases, there may be *a* risk that a Rule 54(b) appeal will simply "delay the trial of the [counterclaim] without in any way simplifying or facilitating its future litigation." *Id.* at 455; *Campbell* v. *Westmoreland Farm, Inc.,* 403 F.2d 939, 942 (2d Cir. 1968).

The mere fact that a non-frivolous counterclaim has been filed, however, does not demonstrate that either of these risks is present. There will frequently be cases, like this one, where there is no risk of duplicative appellate review or unwarranted delay of the proceedings in the trial court. In such cases, the fact that a counterclaim has been filed is an essentially neutral factor in the Rule 54(b) analysis. The presence of that claim of course creates a risk that the plaintiff will ultimately be required to pay back a portion of the Rule 54(b) judgment. But there is an equal risk that the counterclaimant will fail to prove his case at trial and will have to pay out. Common sense suggests that where both parties are solvent the party whose claim is liquidated in amount and reduced to judgment generally has the stronger claim to possession of the disputed fund during the litigation of the remaining claims. *See,* Comment, 56 B.U.L. Rev. 579, 592-93 (1976).[6]

[6] The *dictum* in *Allis-Chalmers* that the presence of a counterclaim in a case "weighs heaviy against the grant of a 54(b) certification," 521 F.2d at 366, thus sweeps too broadly and ought not to be followed.

It is here that the central role of the district judge in the operation of Rule 54(b) emerges. If he determines that the counterclaim is substantial and likely to succeed if pressed to judgment, he may well conclude that certification is unwarranted. On the other hand, the judge may also decide that the counterclaim asserted is so much smaller than the liquidated judgment, or so speculative and difficult of proof, that it would be unfair to delay the entry of judgment while the counterclaimant attempts to prove his case. The judge may even conclude that all or part of the counterclaim is being pressed principally to delay payment on the principal obligation, and enter judgment under Rule 54(b) in order to encourage a prompt settlement of the remaining claims in controversy.

The relationship between Rule 54(b) certifications and settlements is, from the viewpoint of the district courts, particularly significant. In commercial litigation it requires little imagination for lawyers to conjure up facially plausible though factually weak counterclaims Experienced lawyers and judges are all to familiar with the possibilities for delay inherent in liberal federal discovery rules. District judges on the scene are particularly well situated to exercise informed judgment as to when the entry of a final judgment on a complaint will remove the incentive for time consuming and costly litigation over "imaginative" counterclaims. They are, moreover, conscious of the fact that resolution, favorably or unfavorably, of a legal issue dispositive of the plaintiff's claim will frequently produce a climate in which serious settlement negotiations will commence and often succeed. The concern of appellate judges for their own caseloads should not blind them to the reality that by limiting the use of Rule 54(b) they are depriving their brothers in the district court of a significant tool in the management of trial court caseloads.

This case is illustrative. The district judge, on the basis of his personal knowledge of the case, concluded that the presence of General Electric's counterclaim was not a just reason for delay. Curtiss-Wright's liquidated, undisputed claim for nearly $19 million is opposed by an unliquidated, unproven counterclaim for $60 million. But only $1.9 million of that counterclaim is alleged to represent money actually spent by General Electric. The remaining $52-odd million is claimed on the theory that because General Electric spent $1.9 million and thereby helped Curtiss-Wright to avoid a costly default on the subcontracts, it is therefore entitled to recover from Curtiss the $52 million that Curtiss-Wright would have lost in that default on a theory of unjust enrichment. Without expressing definitive views on the merits of the counterclaim, I think it obvious that the district judge concluded, as I do, that it would be unfair to require the plaintiff to finance the prosecution of this claim with its admitted, liquidated judgment. Nor do I regard it as fatal to the certification that the district judge did not list his skepticism about the merits of the counterclaim as a factor in his *Allis-Chalmers* statement. While a judge may not want to appear to prejudge a highly speculative counterclaim, when exercising a judgment as a Rule 54(b) certification he can hardly be blind to its likely worth or to the probability of its settlement when it ceases to serve as an instrument of delay. The district judge may—and often must—rely in his discretionary decisions upon considerations which propriety dictates cannot and should not be placed on the public record. Where, as here, the trial court's *Allis-Chalmers* statement correctly concludes that immediate appeal would not result in any duplicative review or delay of the trial court proceedings, deference to the district court's ap-

praisal of the justice and practicality of entering an immediate judgment is surely appropriate.

The majority opinion strips the district courts in this circuit of the power to make this sort of discretionary Rule 54(b) determination in all cases involving counterclaims. That result, I submit, is squarely contrary to the well-settled principle that the timing of a Rule 54(b) certificate "is, with good reason, vested primarily in the discretion of the District Court as the one most likely to be familiar with the case and with any justifiable reasons for delay." *Sears, Roebuck & Co.* v. *Mackey,* 351 U.S. 427, 437 (1956). *Accord, Bendix Aviation Corp.* v. *Glass,* 195 F.2d 267, 272 (3d Cir. 1952) (*en banc*) (Maris, J.); 10 C. Wright & A. Miller, *Federal Practice & Procedure* § 2659 at 75 (1973); 6 *Moore's Federal Practice* ¶ 54.28[1] at 364; ¶ 54.41[3] at 741 (2d ed. 1976).

The holding is also inconsistent with this court's decisions in *Cold Metal Process Co.* v. *United Engineering & Foundry Co.,* 221 F.2d 115 (3d Cir. 1955), *aff'd,* 351 U.S. 346 (1956), and *Bendix Aviation Corp.* v. *Glass,* 195 F.2d 267 (3d Cir. 1952) (*en banc*). Both cases upheld the jurisdiction of the court of appeals over claims certified under Rule 54(b) despite the pendency in each case of a compulsory counterclaim, and in the absence of any harsh or unusual circumstances beyond those present in this case. In *Cold Metal Process,* the appeal was from a money judgment entered in a complex commercial case. Despite the presence of a compulsory counterclaim, this court concluded that the appeal was "the very kind of thing Rule 54(b) was written to provide for" and held that the district court had not abused its discretion in authorizing it. 221 F.2d 115, 115. The Supreme Court agreed. 351 U.S. at 450-51. *Bendix Aviation Corp.* v. *Glass, supra,* an *en banc*

decision, reviewed a dismissal of plaintiff's claim for specific performance, certified under Rule 54(b), despite the presence of an unadjudicated counterclaim. These cases directly controvert the majority's holding that the pendency of a counterclaim is, without more, a "just reason" for delay under Rule 54(b). That holding is both inconsistent with precedent and unsound on policy grounds.

B. *The "Financial Hardship" Holding*

Because of the panel majority's erroneous view of the effect of the counterclaim upon the Rule 54(b) determination, it skews the Rule 54(b) determination by requiring a showing of "harsh circumstances" in order to justify appeal. Even if I agreed with its position on the effect of the counterclaim, however, I could not accept the panel majority's assertion that for a solvent plaintiff the deprivation for several years of a mere $19 million to which it is concededly entitled can never amount to "harsh circumstances." As Judge Rosenn persuasively demonstrates,[7] this unprecedented result defies common sense, economic reality, and a square holding to the contrary by the Tenth Circuit in *United Bank of Pueblo* v. *Hartford Accident & Indemnity Co.,* 529 F.2d 490 (10th Cir. 1976). At the very least, Judge Rosenn's carefully limited position—that financial hardship to a solvent debtor should be cognizable in a Rule 54(b) determination under the circumstances of this case—is surely correct.

I would go further. Rule 54(b) allows the entry of judgment on a proven or admitted claim when there is "no just reason" for delaying that judgment. By entering that

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[7] Dissenting Opinion at 6-10.

judgment, the district court puts a litigant who would not otherwise be entitled to immediate possession of the disputed fund in a position to execute on the judgment and obtain that fund immediately. In a civil damage action between two solvent parties, it would therefore seem that a needless delay in obtaining possession of a substantial sum of money to which one is entitled under a valid judgment is the *precise* "harsh circumstance" that Rule 54(b) is intended to prevent. The proper rule is that when the district court has determined, as it did here, that "no just reason" exists to delay the entry of judgment, the continued loss of the right to execute on that judgment or obtain a supersedeas bond is *prima facie* an injustice sufficient to support the certification of finality.

Whether one accepts Judge Rosenn's position or mine, however, it is clear that the panel majority's holding is inconsistent with the policy and purposes of Rule 54(b).

VI. Conclusion

Judge Rosenn's dissent demonstrates as well as any opinion can that the panel majority holdings in this case are unsupported by precedent. From what has been said in this opinion, it should also be apparent that these holdings directly undermine the policies which Rule 54(b) seeks to advance. If followed, their effect, I submit, will be to bar the use of Rule 54(b) in "the very kind of case for which Rule 54(b) [was] designed," *Cold Metal Process Co.* v. *United Engineering & Foundry Co.*, 351 U.S. 445, 451 (1951), and to eliminate a significant tool for district court management of the disposition of litigation. Rehearing *en banc* is far more warranted in this case than in many for which we have convened the full court in recent years.

Moreover, given the conflict between this case and the holding of the Tenth Circuit in *United Bank of Pueblo* v. *Hartford Accident & Indemity Co., supra,* and the recognized lack of coherent standards for the review of Rule 54 certifications, *see* 10 C. Wright & A. Miller, Federal Practice *& Procedure* § 2655 at 39 (1973), this case seems a proper occasion[8] for the Supreme Court to break its 23 year silence regarding the proper administration of Rule 54(b) and to provide some much needed guidance to the courts of appeals and to this court especially.

Judge Rosenn joins in this dissent and votes for rehearing *en banc.*

For the reasons pointed out by Judge Rosenn and Judge Gibbons, Judges Adams and Higginbotham believe that the issues raised in this appeal are of sufficient importance so as to command the attention of the full Court. Accordingly, they vote for rehearing.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

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[8] This is particularly the case where, as here, because of recusals only three of seven eligible judges have voted against rehearing *en banc.*

JUDGMENT OF THE THIRD CIRCUIT COURT OF APPEALS ISSUED IN LIEU OF A FORMAL MANDATE ON JUNE 12, 1979

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

Nos. 78-2179 and 78-2293

CURTISS-WRIGHT CORPORATION,

v.

GENERAL ELECTRIC COMPANY,

Appellant.

(D.C. Civil No. 76-0794)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Present: SEITZ, *Chief Judge* and ALDISERT and ROSENN, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel on March 22, 1979.

On consideration whereof, it is now here ordered and adjudged by this Court that the above entitled appeals be, and the same are hereby dismissed for want of an ap-

pealable order and the cause remanded with a direction to the said District Court to vacate so much of its judgment as purported to render a final judgment pursuant to Rule 54(b), all in accordance with the opinion of this Court. Each party to bear its own costs.

Attest:

THOMAS F. QUINN
Clerk

April 17, 1979

Certified as a true copy and issued in lieu of a formal mandate on June 12, 1979.

TEST:

THOMAS F. QUINN
Clerk, United States Court of Appeals for the Third Circuit

GENERAL ELECTRIC'S ANSWERS TO CURTISS-WRIGHT'S INTERROGATORIES 54, 61, 69 & 74

INTERROGATORY 54

As to each instance in which plaintiff has been unjustly enriched as alleged in paragraph 32 of the Counterclaim:

(a) State the date thereof;

Approximately 1970 through 1973.

(b) State in detail all facts which allegedly support the allegation;

Plaintiff has been unjustly enriched in that Defendant, without compensation from Plaintiff, (i) performed work which was the contractual responsibility of Plaintiff; (ii) prevented substantial losses which otherwise would have befallen Plaintiff; and (iii) averted a probable total default in contract performance.

In addition, Plaintiff has been paid for work which it was contractually obligated to perform, but which in fact was partly performed by Defendant. This included specific advice and assistance for the establishment of adequate training and quality control programs.

These facts are shown by the following subsidiary facts or events, among others:

(1) That Plaintiff underestimated the work and encountered severe difficulties in performance is admitted by the Complaint (*e.g.*, ¶¶ 72-74, 81-84, 109).

(2) To prevent a severe default by Plaintiff and grave damage to the timely production of components for the Naval Nuclear Program, Defendant (as well as the Navy) had to render advice and assistance to Plaintiff repeatedly in areas of Plaintiff's management responsibility. These included the establishment and conduct of an adequate training program for welders; the need to explain to Plaintiff its deficiencies in instituting systematic quality control measures; the need to follow up repeatedly because of Plaintiff's unwillingness or inability to carry out suggestions concerning the management of its work; and the need to undertake repeated and extraordinary inspections and to recommend corrective measures due to Plaintiff's unacceptable incidences of defective welding. Under the purhase orders, all of these items were the responsibility of Plaintiff, not Defendant. See also answers to Interrogatories 20 and 25 *supra*.

(3) Plaintiff during the period approximately 1970-73 demonstrated no capacity to resolve without such assistance from Defendant (as well as the Navy) its problems stemming from poor workmanship and inadequate training, inspection, and quality control programs. It is reasonably expectable, therefore, that without the extraordinary assistance rendered by Defendant, the problems would not have been resolved, Plaintiff would have suffered great losses, and would have so seriously breached its obligations to supply conforming articles, within agreed upon delivery schedules, as to be in total default on the purchase orders.

(c) Identify all persons who have knowledge of each fact;

See answers to Interrogatories 20 and 25 *supra*.

(d) Identify each document which discusses, reflects, refers or in any way relates thereto.

See answers to Interrogatories 20 and 25 *supra*.

INTERROGATORY 61

(a) Set forth the total dollar amount of damages claimed by Defendant under Count I of the Counterclaim.

Approximately $1,912,000.

(b) Separately, as to each element of damages, including but not limited to costs or expenses incurred, and/or lost profits, which Defendant seeks to recover under Count I of the Counterclaim:

(i) Set forth the date(s) on which it was incurred;

By Count I, Defendant seeks to recover excess costs and expenses incurred in the following approximate amounts for approximately the years 1970-1973:

1970 — $425,000

1971 — $577,000

1972 — $485,000

1973 — $425,000

(ii) Set forth in detail the substance and purpose thereof;

See responses to Interrogatories 20, 25, 45-47, 54-56 (First Set).

(iii) Identify each person, whether employed by Defendant or the Government, who authorized, recommended or approved any activity or expenditure pertaining thereto.

W. H. Bruggeman

C. R. Stahl

The Managers of the Machinery Apparatus Operation ("M.A.O.") Sections of Reactor Equipment and Heat Exchangers and Pressurizers during the applicable period (approximately 1970-1973) (See response to Interrogatory 2(c) (First Set).)

The Subsection Managers, of Purchasing and Engineering, for the M.A.O. Sections of Reactor Equipment and Heat Exchangers and Pressurizers during the applicable period. (See response to Interrogatory 2(c) (First Set).)

J. W. Vaughan

When seeking payment from the Government pursuant to its prime contracts with the Navy, Defendant submits its Public Vouchers for Purchases and Services other than Personal to the Defense Contract Audit Agency ("DCAA"), which forwards the Vouchers to the Defense Contract Administration Services Region ("DCASR") in Boston, Massachusetts. Payment to Defendant issues from DCASR.

In addition to the foregoing, information which is discoverable and responsive to this Interrogatory may be derived or ascertained from the records of Defendant as made available, or to be made available, to Plaintiff for inspection and copying in response to Plaintiff's First Request for Production of Documents or Plaintiff's Second Set of Interrogatories, which records include but are not limited to the following or portions thereof:

Minutes of Meetings between ANSTR and the General Manager of M.A.O.

Minutes of Meetings between Admiral Rickover and the General Manager of M.A.O.

Files of W. A. Northrop

Documents listed in response to Interrogatory 20(c)(v) (First Set)

See also responses to Interrogatories 25(b)(v), 45(c)(v), and 47(b) (First Set).

(iv) Identify the subcontract(s) under which or in connection with which it was incurred;

Each of the twenty-one subcontractors involved in this action.

(v) Set forth in detail the manner in which the dollar amount thereof was calculated, and identify the date(s) on which said calculations were made and the person(s) who performed and/or approved said calculations.

	($ in 000's)				
	1970	*1971*	*1972*	*1973*	*Total*
Total M.A.O. Labor (Large Components Only)	$875	$874	$872	$870	$3491
Percentage of Normal Labor Allocable to Plaintiff	50.9%	67.2%	55.6%	48.6%	55.5%
Normal Labor Assocable to Plaintiff	$445	$587	$484	$422	$1938

II. Distribution of Normal Labor Allocable to Plaintiff within M.A.O.:

Reactor Equipment Section—35.7%

Heat Exchangers and Pressurizers Section—49.3%

Quality Control and Manufacturing Control and Materials Engineering Sections, and Miscellaneous —15.0%

III. Estimated Percentages in Excess of Normal Labor Expended for Plaintiff During Approximately 1970-1973:

Reactor Equipment Section—100%

Heat Exchangers and Pressurizers Section—25%

Quality Control and Manufacturing Control and Materials Engineering Sections, and Miscellaneous —30%

IV. Calculation of Excess Costs and Expenses Incurred:

Formula—Normal Labor Allocable to Plaintiff X Distribution of Normal Labor Allocable to Plaintiff X Estimated Percentages in Excess of Normal Labor; Plus General and Administrative Expenses and Overhead

	($ in 000's)				
	1970	*1971*	*1972*	*1973*	*Total*
Reactor Equipment Section	$159	$209	$173	$151	$ 692
Heat Exchangers and Pressurizers Section	$ 55	$ 72	$ 60	$ 52	$ 239

	($ in 000's)				
	1970	*1971*	*1972*	*1973*	*Total*
Quality Control and Manufacturing Control and Materials Engineering Sections, and Miscellaneous	$ 20	$ 26	$ 22	$ 19	$ 87
Subtotal	$234	$307	$255	$222	$1018
Add G & A and Overhead	$191	$270	$230	$203	$ 894
TOTAL COST	$425	$577	$485	$425	$1912

Calculations of the nature set forth above were made on or about June 7, 1977, by J. Russell, with W. A. Northrop, R. Savidge, P. Jones, J. Lavish, and R. Henke, and were reviewed by F. J. Balicki and W. A. Northrop. Calculations of the nature set forth above were also made by J. Russell on or about May 2, 1978, and were reviewed by E. A. Klein and W. A. Northrop.

(vii) State whether Defendant seeks recovery on its own behalf or on behalf of the Navy.

For the ultimate benefit of the United States. Such recovery will initially be by, and payment made to Defendant.

(viii) State whether Defendant has invoiced or otherwise requested reimbursement from the Government therefor, and, if applicable, set forth the dollar amount of the invoice or request and the date thereof.

Yes. Information which is discoverable and responsive to this Interrogatory may be derived or ascertained from the records of Defendant as made available, or to be

made available, to Plaintiff for inspection and copying in response to Plaintiff's First Request for Production of Documents or Plaintiff's Second Set of Interrogatories, which record include but are not limited to the following or portions thereof:

> "Public Voucher[s] for Purchases and Services other than Personal" produced by letter dated July 28, 1977.

(ix) State whether Defendant has been reimbursed by the Government therefor, and, if applicable, set forth the dollar amount of the reimbursement and the date thereof;

See response to Interrogatory 61(b)(viii) *supra.*

(x) Identify the prime contract(s) and the applicable provisions thereof under which Defendant was reimbursed by the Government thereof;

Prime contracts:

N0024-67-C-5014

N0024-67-C-5016

N0024-67-C-5321

N0024-69-C-5154

N0024-70-C-5027

N0024-71-C-5461

N0024-72-C-5514

N0024-73-C-5024

N0024-74-C-5009

All the prime contracts listed above are cost-plus-fixed-fee contracts. By their very nature, therefore, they provide for the reimbursement by the Government of allowable costs incurred by Defendant. In addition, this subject is treated in the Article in the General Provisions of each prime contract entitled "Allowable Costs, Fixed Fee, And Payment."

(xi) Set forth the reasons, if any, given by the Government for not reimbursing Defendant in whole or in part therefor. If no reasons were given, so state;

Not applicable.

(xii) Identify each document which discusses, reflects, concerns, or relates thereto, including but not limited to all documents pertaining to the calculation of damages.

Defendant objects to this Interrogatory to the extent that it seeks information which constitutes trade secrets or proprietary information, or information or documents which are protected by the work product privilege or are irrelevant or not reasonably calculated to lead to the discovery of admissible evidence. Without waiving these objections, Defendant makes the following answer.

See responses to Interrogatories 61(b)(ii), 61(b)(iii) and 61(b)(viii) *supra*.

Prime contracts

The twenty-one subcontracts involved in this action.

INTERROGATORY 69

(a) Set forth the total dollar amount of damages claimed by Defendant under Count V of the Counterclaim.

In excess of $53,993,023.

By Count V of its Counterclaim, Defendant seeks to recover (1) the value of the benefit conferred upon Plaintiff as a result of the assistance furnished to Plaintiff by Defendant which went beyond the tacit understanding described in the response to Interrogatory 15(b) (First Set); and (2) amounts constituting the unjust enrichment of Plaintiff resulting from Plaintiff's avoidance of increased costs, substantial losses, and termination-for-default damages as a result of the extraordinary assistance provided by Defendant. With respect to the value of the benefit conferred upon Plaintiff, the total dollar amount is related to the increased costs which Plaintiff would have incurred but for Defendant's extraordinary assistance. Defendant at present has insufficient information to derive or ascertain the total amount of these costs, but such amount exceeds the estimated $1,912,000 that represents the approximate costs incurred by Defendant in rendering the extraordinary assistance. With respect to the remaining damages sought by Count V, (1) Defendant at present has insufficient information to derive or ascertain the increased costs or losses which Plaintiff would have incurred had not Defendant rendered extraordinary assistance; and (2) an estimate of the total damages for which Plaintiff would have been liable had it been terminated for default is $52,081,023.

(b) Separately, as to each element of damages, including but not limited to unjust enrichment, benefit con-

ferred, loss to Plaintiff prevented, and/or lost profits, which Defendant seeks to recover under Count V of the Counterclaim:

(i) Set forth the date(s) on which it was incurred;

With respect to the value of the benefit conferred upon Plaintiff, Defendant at present has insufficient information to respond to this Interrogatory. With respect to the remaining damages sought by Count V, such damages are not divisible in the manner requested in this Interrogatory 69(a) *supra*.

(ii) Set forth in detail the nature thereof;

See response to Interrogatory 69(a) *supra*.

(iii) Identify the subcontract(s) under which or in connection with which it occurred;

Each of the twenty-one subcontracts involved in this action.

(iv) Set forth the exact dollar amount thereof;

See response to Interrogatory 69(a) *supra*.

(v) Set forth in detail the manner in which the dollar amount thereof was calculated, and identify the date(s) on which said calculations were made and the person(s) who performed and/or approved said calculations;

With respect to the value of the benefit conferred upon Plaintiff as a result of the extraordinary assistance provided by Defendant, see responses to Interrogatories 61(b)(v) and 69(a) *supra*. With respect to amounts constituting the unjust enrichment of Plaintiff resulting from Plaintiff's avoidance of increased costs and substantial losses, see response to Interrogatory 69(a) *supra*. The following is an estimate of the termination-for-default damages avoided by Plaintiff as a result of Defendant's extraordinary assistance:

Assume termination for default on December 31, 1972.

Purchase Order	*Progress Payments Recalled (Includes allowance for amounts liquidated and amounts applied to purchase of material in progress)*	*Cost to Pack and Ship Material Purchased*	*Excess Costs of Reprocurement*
A-550	$ 1,011,604	$ 687,890	$ 5,231,983
A-595	$ 497,287	$ 338,155	$ 1,575,929
A-641	$ 412,778	$ 280,689	$ 1,549,180
A-642	$ 231,498	$ 157,419	$ 1,223,047
A-656	$ 937,980	$ 637,827	$ 3,189,417
A-661	$ 753,827	$ 512,602	$ 2,336,437
A-675	$ 684,462	$ 465,434	$ 1,825,180
A113	—	—	$ 290,856
B382	$ 396,529	$ 269,639	$ 864,032
B-412	$ 358,496	$ 243,777	$ 897,376
B-423	$ 56,773	$ 38,606	$ 196,759
B-433	$ 284,835	$ 193,688	$ 823,416
B-384	$ 532,689	$ 362,228	$ 2,916,046
B-425	$ 351,532	$ 239,041	$ 838,082

Purchase Order	*Progress Payments Recalled (Includes allowance for amounts liquidated and amounts applied to purchase of material in progress)*	*Cost to Pack and Ship Material Purchased*	*Excess Costs of Reprocurement*
B-429	$ 1,049,045	$ 813,351	$ 3,033,045
B-452	$ 1,248,498	$ 565,986	$ 2,599,712
B-478	—	—	$ 637,932
B-410	$ 970,148	$ 439,800	$ 3,010,500
B-442	$ 158,849	$ 108,017	$ 627,460
B-451	$ 66,354	$ 45,120	$ 381,755
B-428	$ 452,940	$ 307,999	$ 869,487
TOTAL	$10,456,124	$6,707,268	$34,917,631

Total Estimated Termination-for-Default Damages:

$10,456,124
6,707,268
34,917,631

$52,081,023

Calculations of the nature set forth above were made on or about June 2-6, 1977, and were reviewed by E. A. Klein, J. Holup, F. J. Balicki and W. A. Northrop. Calculations of the nature set forth above were also made on or about April 26, 1978, by A. Keating, J. McKeon, P. Smith, M. Ottati, T. Fallon, J. Maslyn, R. Buck, H. L. D. Boone and D. Fawl; and were reviewed by J. Grout, J. Holup, E. A. Klein and W. A. Northrop.

(vi) Identify each person, whether employed by Defendant or the Government, who authorized, recommended or approved any activity or expenditure pertaining thereto;

See response to Interrogatory 61(b)(iii) *supra.*

(vii) State whether Defendant seeks recovery on its own behalf or on behalf of the Navy;

For the benefit of Defendant.

(viii) State whether Defendant has invoiced or otherwise requested reimbursement from the Government therefor, and, if applicable, set forth the dollar amount of the invoice or request and the date thereof;

Not applicable.

(ix) State whether Defendant has been reimbursed by the Government therefor, and, if applicable, set forth the dollar amount of the reimbursment and the date thereof;

Not applicable.

(x) Identify the prime contract(s) and the applicable provisions thereof under which Defendant was reimbursed by the Government therefor;

Not applicable.

(xi) Set forth the reasons, if any, given by the Government for not reimbursing Defendant in whole or in part therefor.

If no reasons were given, so state;

Not applicable.

(xii) Identify each document which discusses, reflects, concerns, or relates thereto, including but not limited to all documents pertaining to the calculation of damages.

See response to Interrogatory 61(b)(xii) *supra.*

(c) State whether the damages claimed by Defendant under Count V of the Counterclaim are in addition to the damages claimed by Defendant under either Counts I, II, III, or IV or whether Count V sets forth an alternate legal theory for recovering damages which Defendant seeks to recover under either Counts I, II, II [*sic*] or IV.

In addition to the damages sought by Counts I—IV of Defendant's Counterclaim.

INTERROGATORY 74

(a) State whether Defendant seeks to recover or set off any element of damage, including but not limited to costs or expenses, lost profits and/or unjust enrichment as the result of any instance of assistance to Plaintiff as set forth in the response to Interrogatories 71 and 72, *supra.*

Yes.

(b) Separately, as to each such instance:

(i) Set forth in detail the substance and purpose of the assistance provided and the date(s) on which it was provided;

See responses to Interrogatories 71(b)(i), 71(b)(ii), 72 and 73(a)(i)-(ii) *supra.*

(ii) Identify the persons who provided the assistance and the persons to whom it was provided;

See responses to Interrogatories 61(b)(ii), 72(b)(iii), 72(d)(iv), and 73(a)(iii) *supra.*

(iii) Identify each person, whether employed by Defendant or the Government, who authorized, recommended or approved any activity or expenditure pertaining thereto;

See responses to Interrogatories 71(b)(iii), 72 and 73 (a)(iii) *supra.*

(iv) Identify the subcontract(s) under which or in connection with which it was incurred;

Each of the twenty-one subcontracts involved in this action.

(v) Set forth the exact dollar amount thereof;

By Counts I-IV of its Counterclaim, Defendant seeks to recover the cost of only the assistance furnished to Plaintiff by Defendant which went beyond the tacit understanding described in the response to Interrogatory 15(b) (First Set). As to an estimate of the dollar amount sought for this extraordinary assistance, and how it was calculated, see responses to Interrogatories 61(a), 61(b)(v), 63(a), 63(b)(v), 65(a), 65(b)(v), 67(a) and 67(b)(v) *supra.* The cumulative effect of *all* the assistance provided to Plaintiff by Defendant was the prevention of substantial costs and losses which would have otherwise been incurred by Plaintiff and the avoidance by Plaintiff of substantial damages which would have otherwise arisen if Plaintiff had defaulted on the twenty-one

subcontracts. By Count V of its Counterclaim, Defendant seeks the recovery of these benefits conferred upon Plaintiff, or costs, losses, and damages avoided. As to an estimate of the dollar amount sought by Count V, and how it was calculated, see responses to Interrogatories 69(a) and 69(b)(v) *supra.*

(vi) Set forth in detail the manner in which the dollar amount thereof was calculated, and identify the date(s) on which said calculations were made and the person(s) who performed and/or approved said calculations;

See response to Interrogatory 74(b)(v) *supra.*

(vii) State whether Defendant seeks recovery on its own behalf or on behalf of the Navy;

See responses to Interrogatories 61(b)(vii), 61(b)(vii), 65(b)(vii), 67(b)(vii) and 69(b)(vii) *supra.*

(viii) State whether Defendant has invoiced or otherwise requested reimbursement from the Government therefor, and, if applicable, set forth the dollar amount of the invoice or request and the date thereof;

See responses to Interrogatories 61(b)(viii), 63(b)(viii), 65(b)(viii), 67(b)(viii), and 69(b)(viii) *supra.*

(ix) State whether Defendant has been reimbursed by the Government therefor, and, if applicable, set forth the dollar amount of the reimbursement and the date thereof;

See responses to Interrogatories 61(b)(ix), 63(b)(ix), 65(b)(ix), 67(b)(ix), 69(b)(ix) *supra.*

(x) Identify the prime contract(s) and the applicable provisions thereof under which Defendant was reimbursed by the Government therefor;

See responses to Interrogatories 61(b)(x), 63(b)(x), 65(b)(x), 67(b)(x), and 69(b)(x) *supra.*

(xi) Set forth the reasons, if any, given by the Government for not reimbursing Defendant in whole or in part therefor. If no reasons were given, so state;

Not applicable.

(xii) Set forth the date(s) on which Defendant demanded compensation or notified Plaintiff of an intention to set off and identify each person who made such demand or gave such notice and each person upon whom demand or notice was made. If no demand was made or notice given, so state;

See responses to Interrogatories 62(a)(vii), 64(a) (vii), 66(a)(vii), 68(a)(vii), and 70(a)(vii) *supra.*

(xiii) Set forth the date on which Defendant and/or the Government decided that a claim should be made against Plaintiff and identify each person who was involved in so deciding;

See responses to Interrogatories 62(a)(viii), 64(a) (viii), 66(a)(viii), 68(a)(viii), and 70(a)(viii) *supra.*

(xiv) Set forth the date on which Defendant and/or the Government began to maintain a record or account thereof and identify each person who maintained such record or account;

Answers to Interrogatories

See responses to Interrogatories 62(a)(ix), 64(a)(ix), 66(a)(ix), 68(a)(ix),and 70(a)(ix) *supra.*

(xv) Separately, as to each subparagraph (i)-(xiv), *supra,* identify each document which discusses, reflects, concerns, or relates to the response thereto.

See responses to Interrogatories 61(b)(xii), 62(a)(xi), 63(b)(xii), 64(a)(xi), 65(b)(xii), 66(a)(xi), 67(b)(xii), 68(a)(xi), 69(b)(xii), 70(a)(xi), 72(a)(ii), 72(b)(ii), 72(c)(iii), 72(d)(v), and 73(b) *supra.*